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GLOSSARY

"APIs"	Application Programming Interfaces. APIs are interfaces exposed by an operating system or other platform software that can be invoked by other software to obtain a wide range of system services, such as displaying text on the video monitor or saving a document to the hard disk.
"DOJ"	Antitrust Division of the U.S. Department of Justice.
"FF"	Findings of fact issued by the district court on November 5, 1999 and reported at 84 F. Supp. 2d 9 (D.D.C. 1999).
"IAPs"	Internet Access Providers. Plaintiffs use the term IAPs to refer collectively to both ISPs and OLSs.
"ICPs"	Internet Content Providers. ICPs are entities that provide content and applications to users of the Internet by maintaining Web sites.
"IE"	The Internet Explorer components of Windows operating systems.
"ISPs"	Internet Service Providers. ISPs provide their subscribers with a connection to the Internet via telephone, cable or satellite, typically in exchange for a monthly fee.
"ISVs"	Independent Software Vendors. ISVs are entities engaged in developing and marketing software products, including applications, tools and utilities.
"Java"	The term Java applies to three separate but related concepts: (i) a high-level programming language developed by Sun, (ii) a set of class libraries that provide services to Java programs, and (iii) a runtime called a Java Virtual Machine that executes Java programs. The Java programming language is an object-oriented variant of the C++ programming language that has been simplified to eliminate features like memory pointers that cause common programming errors.
"JVM"	Java Virtual Machine. Software that executes programs written in the Java programming language after they have been compiled into intermediate instructions called Java bytecodes. JVMs are included with popular operating systems from vendors like Apple, Hewlett-Packard, IBM, Microsoft and Novell.

"Linux"	An operating system whose kernel was created in 1991 by Linus Torvalds, a Finnish graduate student, and subsequently expanded and improved on a cooperative basis by software developers around the world.
"MS Br."	Brief for Defendant-Appellant Microsoft Corporation.
"Navigator"	Web browsing software developed by Netscape. Netscape and Navigator are now owned by AOL Time Warner.
"Netscape"	Netscape Communications Corp. A company co-founded by Marc Andreessen and Jim Clark that developed the first commercially successful Web browsing software. Netscape is now owned by AOL Time Warner.
"NSP"	Native Signal Processing. NSP is the name Intel gave to a group of software products designed to consume additional microprocessor cycles and thereby spur demand for more advanced Intel products. NSP narrowly refers to the ability of Intel microprocessors to process certain digital signals internally rather than through the use of an external device known as a digital signal processor or DSP. As originally designed by Intel in 1995, NSP software was incompatible with both Windows 95 and Windows NT.
"OEMs"	Original Equipment Manufacturers. OEMs are manufacturers or assemblers of personal computers.
"OLSs"	Online Services. OLSs provide their subscribers with a connection to the Internet as well as proprietary content and services like e-mail and personal Web pages.
"PC"	Personal Computer.
"Pls. Br."	Brief for Appellees United States and the State Plaintiffs.
"Windows 95"	A client operating system developed by Microsoft that was commercially released in August 1995. Windows 95 incorporated the functionality of MS-DOS and Windows 3.1 in a 32-bit operating system with a range of new features and functionality. Windows 95 was updated with various interim releases, called OSRs, that were provided by Microsoft to OEMs.

"Windows 98"	A client operating system developed by Microsoft that was commercially released in June 1998. Windows 98 is an improved version of Windows 95 that includes a range of new features and functionality. Windows 98 has been updated by interim releases provided to OEMs.
"Windows NT"	An operating system developed by Microsoft that was first commercially released in 1992. Windows NT has a fundamentally different architecture than Windows 95, Windows 98 and Windows Millennium. The three principal versions of Windows NT (3.1, 3.51 and 4.0) were targeted primarily at business customers. Windows NT is the predecessor of Windows 2000.
"Windows Update"	A feature of Windows 98 that automatically detects when new enhancements to the operating system have not been installed on a user's computer and allows the user to download such enhancements easily from a Microsoft Web site.

INTRODUCTION

Plaintiffs acknowledge that much of the conduct they challenge was lawful and procompetitive. On the central issue in the case, plaintiffs concede that Microsoft did not violate the antitrust laws by "offering IE to OEMs in a bundle with Windows at no extra charge." Pls. Br. at 63-64. Indeed, they admit that the district court found Microsoft's conduct "in developing a Web browser and offering it to OEMs and users with Windows to be lawful." *Id.* at 66. With regard to the challenged distribution agreements, plaintiffs concede that "[d]eveloping and improving [IE], making it widely available, and encouraging its use based on the merits of the product constituted competition on the merits." *Id.* at 62. And, with regard to Java, plaintiffs acknowledge that Microsoft "develop[ed] an attractive alternative Java implementation" for Windows. *Id.* at 66-67. Whatever remains of plaintiffs' case after these concessions does not amount to a Sherman Act violation, and is certainly not sufficient to justify breaking up Microsoft and imposing other extreme relief.

Despite acknowledging the procompetitive nature of much of the challenged conduct, plaintiffs' over-arching theme is that Microsoft's conduct "would be inexplicable for a non-monopolist." *Id.* at 42. Contrary to plaintiffs' repeated assertions, *e.g.*, *id.* at 3, 36, 65, the challenged conduct made perfect "business sense" for anyone seeking to develop and market operating systems that appeal to users and ISVs. In response to demand for Internet-related functionality, *all* major operating systems—not just Windows—now include Web browsing software. Schmalensee ¶¶ 216-23; Allchin ¶¶ 261-77. In fact, Netscape correctly predicted in January 1995—before any of the challenged conduct occurred—that all vendors would "eventually incorporate some Web browser functions into their operating systems as standard features" and "offer this functionality at little or no additional cost to customers." DX 68 at 69242.

Microsoft announced its decision to "include built-in access to the Internet" in Windows long before Netscape released its first version of Navigator. MS Br. at 21. Even plaintiffs grudgingly concede that "improving the quality of Windows by including Web browsing or other functionalities without separate charge might have made business sense." Pls. Br. at 62; *see also United States* v. *Microsoft Corp.*, 84 F. Supp. 2d 9, 45 (D.D.C. 1999) (FF 140).

After investing "more than $100 million each year" to improve the IE components of Windows, Pls. Br. at 15, it also made perfect business sense for Microsoft to enter into agreements designed to achieve widespread distribution of IE, thereby helping to attract ISV interest in the new platform capabilities IE provided. Such cross-marketing agreements are commonplace in all industries, not just in software. 1/4/99 pm Tr. at 83-91; 2/9/99 am Tr. at 31-37; GX 1256 at 294, 295; DX 1427; DX 2082. Microsoft has been following this same business model—improving its platforms to meet demand for additional functionality, distributing those improvements broadly and encouraging ISVs to utilize those improvements—for 20 years.

Instead of addressing the fatal defects in their case, plaintiffs drape themselves in the district court's findings of fact, intimating that this Court is constrained to accept those findings without subjecting them to scrutiny. In considering this invitation to rubberstamp what the district court did, the Court should bear in mind the district court's goal in drafting its findings. As the district judge told Ken Auletta, a reporter for the *New Yorker* writing a book about the case, he separated his findings of fact from his conclusions of law (thus enabling him to import numerous conclusions into his findings) in order to insulate his ruling from reversal:

> There may have been another motive to split the facts from the law, whispered lawyers on opposite sides of the case: Judge Jackson was trying to box in the Court of Appeals. Guilty, Jackson later admitted to me, "The general rule of law is that the Court of Appeals is generally expected to defer to the trial judge as to matters of fact—unless the findings are clearly erroneous . . . . What I want to do is confront the Court of Appeals with an established factual record which is a fait

> accompli. And part of the inspiration for doing that is that I take mild offense at their reversal of my preliminary injunction in the consent-decree case, where they went ahead and made up about ninety percent of the facts on their own."

KEN AULETTA, WORLD WAR 3.0: MICROSOFT AND ITS ENEMIES 230 (2001).

The district judge's repeated public comments (*see* MS Br. at 146-50) also demonstrate an animus towards Microsoft so strong that it inevitably infected his rulings. For example, Auletta reports that the district judge compared Microsoft executives to unremorseful gang members convicted of brutal, execution-style murders, AULETTA, *supra* at 369-70, and criticized Microsoft's CEO for having "'a Napoleonic concept of himself and his company,'" *id.* at 397. Indeed, in the public eye, the district judge has joined the fray as an adversary of Microsoft.

By contrast, the district judge told Auletta that he holds government lawyers in particularly high regard, giving credence to the charges they level against a defendant:

> "I trust the lawyers from the Department of Justice. I trust civil servants and the U.S. attorneys. I'm not hostile to the government . . . . In criminal cases, by and large, my experience is that when the government charges someone, they are probably guilty. I give the benefit of presumptive innocence, but I know of no case of a wrongful conviction."

Id. at 44.

Such comments put the proper gloss on the district court's findings. In another case in which there was reason—but far less reason—to question whether a district judge improperly decided a matter based on his personal views, this Court stated: "[I]n light of the special circumstances of this case, we have reviewed the District Court's findings against the record with particular, even painstaking, care." *S. Pac. Communications Co.* v. *AT&T*, 740 F.2d 980, 984 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985). Painstaking review is warranted here as well.

SUMMARY OF ARGUMENT

1. Plaintiffs continue to retreat from their tying claim. Although they pay lip service to the notion that Windows and IE are "separate products," plaintiffs make no effort to satisfy this

Court's test. In fact, plaintiffs no longer argue that IE can or should be removed from Windows, recognizing that other parts of the operating system and numerous Windows applications rely on IE. Instead of attempting to show that the many benefits of Microsoft's integrated design could be duplicated by combining an operating system with a standalone Web browser such as Navigator, plaintiffs argue something completely different: that Microsoft violated Section 1 because it failed to permit its distributors—OEMs—to hide "user access" to the built-in Web browsing functionality in Windows. That argument flies in the face of this Court's June 1998 decision and tying law generally. *See United States* v. *Microsoft Corp.*, 147 F.3d 935, 941 n.3 (D.C. Cir. 1998) ("[B]y allowing OEMs to conceal IE, rather than to refuse it, the remedy fits poorly with the Department's tying theory."). Plaintiffs' failure to show that the alleged tie foreclosed competition in the "Web browser" market is also fatal to their tying claim. Microsoft's lack of success with IE 1 and IE 2 is dispositive on this point. Although included in every copy of Windows 95 distributed through the OEM channel over a twelve-month period, IE 1 and IE 2 struggled to obtain a 5% usage share, while Navigator enjoyed a usage share exceeding 80%.

2. Plaintiffs have not shown that Microsoft possesses "monopoly power," *i.e.*, the power to control price or exclude competition. Plaintiffs also have not established that Microsoft engaged in "anticompetitive" conduct, or that the challenged conduct contributed significantly to the maintenance of Microsoft's supposed monopoly. The two principal pillars of plaintiffs' monopoly maintenance claim—tying and exclusive dealing—were also the bases for plaintiffs' Section 1 claims. Plaintiffs cite no authority for their assertion that conduct can be "exclusionary" under Section 2 even though it did not "unreasonably restrain trade" under Section 1. Nor do plaintiffs address the district court's findings that Netscape was able to distribute 160 million copies of Navigator in 1998 alone and had access to "every PC user worldwide," which under-

mine any claim of foreclosure. Finally, plaintiffs failed to prove that there would be any more competition in the putative market for "Intel-compatible PC operating systems" if Microsoft had not engaged in the challenged conduct.

3. Plaintiffs base their attempted monopolization claim primarily on the June 1995 discussions between Microsoft and Netscape, which they concede resulted in nothing. Plaintiffs cite only one case, *United States* v. *American Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984), *cert. dismissed*, 474 U.S. 1001 (1985), in which a court found that making a proposal that is then rejected by the other party can constitute attempted monopolization. Microsoft's efforts to persuade Netscape to utilize Internet-related functionality in Windows 95 bear no resemblance to the naked price-fixing proposal in *American Airlines*. Plaintiffs also ignore Barksdale's admission that Microsoft was eager at the time for Netscape to release a version of Navigator for Windows 95 because Microsoft believed it would increase demand for the new operating system. Plaintiffs go on to argue that Microsoft's "post-June 1995" conduct likewise constituted attempted monopolization. Yet they concede that Microsoft's goal in competing with Netscape was to prevent Navigator from becoming the "standard" Web browsing software, not to obtain "monopoly power" in the alleged "Web browser" market. Plaintiffs also have not established a dangerous probability of monopolization, especially now that Navigator is in the hands of AOL Time Warner, a formidable competitor.

4. The extreme relief imposed by the district court without conducting an evidentiary hearing is unsustainable. Plaintiffs' various arguments in defense of the district court's decision to impose extreme relief based on uncross-examined declarations and excerpts from newspaper and magazine articles are specious. The district court was not at liberty to deny Microsoft an evidentiary hearing on disputed factual issues or to base permanent injunctive relief on rank hear-

say. More fundamentally, neither the facts nor the law justifies breaking up Microsoft or imposing punitive "conduct" remedies that would result in confiscation of Microsoft's intellectual property and unprecedented governmental regulation of the design of Microsoft's operating systems. In addition to these defects, if the Court rejects any of the district court's liability rulings, the entire decree must be vacated because it is impossible to determine which provisions were intended to redress which supposed violations.

5. Once plaintiffs were permitted to expand their case dramatically, the district court abused its discretion in rushing the case to trial and limiting both sides to twelve witnesses. Contrary to plaintiffs' assertions, Microsoft never agreed to the district court's unorthodox procedures. Nor can plaintiffs deny that it is impossible to ascertain whether the district court improperly relied on inadmissible hearsay because there are no record citations in its findings.

6. The district judge's public comments about the merits of the case and his *ad hominem* attacks on Microsoft are indefensible. Plaintiffs cannot seriously contend, for example, that it was permissible for the district judge to compare Microsoft to "gangland killers" in comments made to a reporter while the case was still pending. Such comments (i) violate the Code of Conduct for United States Judges, (ii) are clear grounds for disqualification under 28 U.S.C. § 455(a), and (iii) provide an independent basis to vacate the judgment.

ARGUMENT

Plaintiffs argue that Microsoft waived any challenge to the district court's findings because it did not "assert specifically that any fact found by the district court is clearly erroneous." Pls. Br. at 3. They acknowledge, however, that Microsoft expressly stated that the district court's findings are subject to review for clear error, *id*. at 46, and their brief makes abundantly clear that they understand Microsoft is challenging the accuracy of many findings, particularly those relating to market definition, monopoly power, product design and Netscape's distribution of Navigator through the OEM and IAP channels. Plaintiffs fail to cite a single case which holds that a defendant waives its challenge to factual findings if it does not expressly invoke the "clearly erroneous" mantra each time it takes issue with a finding. To the contrary, when an appellant expresses disagreement with a finding of fact, this Court reviews the evidence discussed by the district court and the parties and rejects the finding if the Court is "left with the definite and firm conviction that a mistake in factfinding has been committed by the trial court." *S. Pac. Communications*, 740 F.2d at 998.

Given the district court's failure to cite any evidence in its findings of fact, plaintiffs have done nothing to assist this Court's review by simply regurgitating the findings in their statement of case and only sporadically citing record evidence. Making matters worse, plaintiffs' description of the facts is sometimes so incomplete as to be misleading. For example, in discussing Intel's NSP software, Pls. Br. at 39-40, plaintiffs fail to mention that NSP was incompatible with Windows 95 and Windows NT, MS Br. at 55-57; DX 978. Plaintiffs also state that Microsoft delayed the release of Windows 98 to permit inclusion of IE 4, Pls. Br. at 23, but they fail to acknowledge that IE 4 was made available on October 1, 1997, eight months *before* the June 1998 release of Windows 98, 84 F. Supp. 2d at 13 (FF 8); Chase ¶ 136; 2/4/99 pm Tr. at 11-12. In other instances, plaintiffs' description of the facts is simply false. For example, they assert that "[e]ven as late as *June 1995*," Microsoft was planning to include only "low-level Internet 'plumbing'" with Windows 95. Pls. Br. at 20 (emphasis added). The cited finding, however, says something different: "[A]s late as *the fall of 1994*, Microsoft was planning to include low-level Internet 'plumbing,' such as a TCP/IP stack, but not a browser, with Windows 95." 84 F. Supp. 2d at 49 (FF 156) (emphasis added). And the two cited exhibits, GX 124 and GX 125, are dated

April 1994 and *June 1994,* respectively. GX 124 (April 20, 1994 e-mail); GX 125 (June 10, 1994 e-mail); *see also* MS Br. at 20-24 (Microsoft's decision to include IE in Windows predated Netscape's emergence as a competitor).

For Microsoft to prevail, however, this Court need not reject a single finding of fact. As Microsoft explained in its opening brief, MS Br. at 68, even if one were to accept the district court's one-sided findings *in toto*, the district court's conclusion that Microsoft violated the Sherman Act and corresponding state-law provisions is unsustainable as a matter of law.

I.

The District Court's Tying Ruling Should Be Reversed.

Plaintiffs continue to de-emphasize their tying claim, which was the focus of their complaints and their *sole* basis for urging that the case be rushed to trial. *See* 5/22/98 Tr. at 5-12, 20-24, 30-33. Plaintiffs no longer seriously contend that IE is a "separate product" that can be removed from Windows. Instead, they now claim that Microsoft violated the antitrust laws because it did not permit its distributors, OEMs, to remove from Windows "the means of user access" to some of the Web browsing functionality provided by IE. Pls. Br. at 104. By arguing that only "user access" to this functionality should be made removable, plaintiffs acknowledge that IE provides important functionality to other parts of the operating system (*e.g.*, the Windows Update feature) and to applications running on Windows. Plaintiffs cite no case upholding a tying claim based on a defendant's failure to permit its distributors to hide "user access" to valuable features of a product that benefit consumers.

Recognizing that they cannot establish that Windows 98 is an unlawful tie under controlling precedent, plaintiffs focus on Microsoft's inclusion of IE 1 and IE 2 in Windows 95 in the twelve months between August 1995 and August 1996, something barely mentioned in their complaints. Pls. Br. at 101, 102, 105. Plaintiffs argue that "[w]hatever the implications of [this

Court's decision] for the versions of Windows and IE that are physically linked, it provides no basis to reverse the district court's determination that Microsoft unlawfully tied IE 1 and IE 2." *Id.* at 102. That plaintiffs are reduced to arguing about obsolete versions of IE that have not been part of Windows for more than four years speaks volumes about their tying claim.

Although IE was less integrated in the initial releases of Windows 95 than it was in subsequent releases, Microsoft's inclusion of IE 1 and IE 2 in the operating system had *no* antitrust significance because it resulted in no foreclosure of competition in the putative "Web browser" market. As the district court found, in late 1995 and early 1996, IE's usage share was approximately 5%, whereas Navigator's usage share exceeded 80%. 84 F. Supp. 2d at 98-99 (FF 360); *see also* Barksdale ¶ 222; Warren-Boulton ¶ 137; Fisher ¶ 230; Allchin ¶ 322; Chase ¶ 136. The fact that so many users in 1995 and 1996 chose to use Navigator rather than IE despite the presence of an IE icon on the desktop of every copy of Windows 95 distributed through the OEM channel demonstrates that the alleged tie had *no* competitive impact whatsoever in the market for the putative tied product. Schmalensee ¶¶ 524-25. Even plaintiffs' own economist, Franklin Fisher, admitted that IE 1 and IE 2 were competitively insignificant because so few consumers used them. 6/3/99 pm Tr. at 47-48.

Absent some exclusionary effect, the inclusion of IE 1 and IE 2 in Windows—Microsoft's first steps in integrating Web browsing functionality into the operating system—cannot violate Section 1, much less provide a basis for breaking up the company four years later. *See Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 21 n.34 (1984) ("The legality of petitioners' conduct depends on its competitive consequences, not on whether it can be labeled 'tying.'"). All that IE 1 and IE 2 establish is that, contrary to plaintiffs' claim, distribution of Web browsing software in the operating system is not uniquely effective in garnering usage.

A. Windows and IE Are Not "Separate Products" under This Court's Test.

Plaintiffs contend that the district court properly applied the "conventional" *Jefferson Parish* test rather than the test articulated by this Court in its June 1998 decision. Pls. Br. at 98. Although the district court initially recognized that this Court "articulate[d] a framework for determining whether an integration amounts to a single product for purposes of evaluating a tying claim," *United States* v. *Microsoft Corp.*, 1998-2 Trade Cas. (CCH) ¶ 72,261, at 82,675 (D.D.C. Sept. 14, 1998), plaintiffs argue that this Court's decision provided no "direct guidance on how to apply Section 1 to tying arrangements," Pls. Br. at 101.

To begin with, the Supreme Court held in *Jefferson Parish* "that products are separate for tie-in purposes if there are separate markets for *each* product." *Jack Walters & Sons Corp*. v. *Morton Bldg., Inc.*, 737 F.2d 698, 703 (7th Cir.) (emphasis added), *cert. denied*, 469 U.S. 1018 (1984); *see also* X PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 1745d2, at 211 (1996) ("[A] distinct market for the tied item does not imply separate products absent widespread sales of the tying item in unbundled form."). There is virtually no consumer demand for operating systems with no Web browsing functionality. Because Internet access is the leading reason consumers purchase personal computers today, all major operating systems now provide Web browsing functionality. Schmalensee ¶¶ 216-23; Allchin ¶¶ 261-77; *see also* Rose ¶¶ 19, 21.

More importantly, plaintiffs do not dispute that this Court previously rejected the DOJ's assertion that *Jefferson Parish*'s "consumer-demand" test applies to integrated products. 147 F.3d at 946. This Court stated that applying the "consumer-demand" test to integrated products would stymie innovation by thwarting companies' "legitimate desire to continue to integrate products that had been separate—and hence necessarily would have been provided in distinct markets." *Id.* at 953. Plaintiffs say nothing about the chilling effect that applying *Jefferson Parish* to integrated products would have on innovation in a wide range of industries. *See* MS Br.

at 70. They do not deny that under the "consumer-demand" test, every addition of new functionality previously provided by a standalone product could be challenged as an unlawful tie, thus making the permissibility of such innovations a question for judges and juries.

Plaintiffs' efforts to minimize the significance of this Court's decision are unavailing. First, although this Court's decision involved the "construction of a consent decree," Pls. Br. at 101, plaintiffs do not deny that this Court relied on antitrust cases and the Areeda treatise in fashioning its test. *See* 147 F.3d at 948-50. Second, plaintiffs argue that this Court's decision has "only limited application here" because it centered on "the combinations of Windows 95 with IE3 and IE4," whereas this case also involves IE 1 and IE 2. Pls. Br. at 101. Plaintiffs do not dispute, however, that the focus of this case has always been on Windows 98, and that IE is even more deeply integrated into Windows 98 than it was into Windows 95. *See* 11/16/98 pm Tr. at 46. Third, plaintiffs emphasize that this Court's decision was based on "a 'limited record,'" Pls. Br. at 105 (quoting 147 F.3d at 950 n.15), but the applicable legal framework does not change depending on the extent of the record. Fourth, plaintiffs suggest that less deference should be given to product design decisions in the software industry because software "is a uniquely malleable product." *Id.* at 67. Yet this Court established its test fully cognizant that "[s]oftware code by its nature is susceptible to division and combination in a way that physical products are not." 147 F.3d at 951.

As a fallback, plaintiffs argue, as they did below, that Windows and IE are separate products under this Court's test. Pls. Br. at 104-07. Had the district court agreed, it presumably would have so ruled. Plaintiffs come up short under this Court's test in any event because they cannot show that the many benefits of Microsoft's integrated design could be duplicated by combining an operating system "with a stand-alone browser such as Netscape's Navigator." 147 F.3d at 950. In fact, plaintiffs do not even attempt to meet that standard.

Plaintiffs do not deny that Microsoft's design of Windows to include Web browsing software produced significant, tangible benefits to users, ISVs and OEMs. *See* Allchin ¶¶ 105-41 & App. A. To the contrary, plaintiffs concede that the district court found that Microsoft's inclusion of Web browsing functionality in Windows benefited consumers. Pls. Br. at 66, 103 (citing 84 F. Supp. 2d at 55, 110-11 (FF 186, 408)). They also accept that there are significant benefits to "using HTML rendering and other technologies used in browsing to provide non-browsing functions" in Windows 98, such as the user interface, the HTML Help system and the Windows Update feature. *Id*. at 66. And plaintiffs acknowledge that "IE expose[s] APIs" on which ISVs rely in developing applications for Windows, *id*. at 122, including applications that display information in HTML, 147 F.3d at 950-51. Rather than attempting to show that any of these benefits could be duplicated by combining an operating system with a standalone Web browser such as Navigator—as required by this Court's test—plaintiffs proclaim with remarkable circularity that the benefits can be obtained by combining Windows with its IE components. Pls. Br. at 107; *see also* MS Br. at 76-77.

Plaintiffs also argue that "there was no reason why Microsoft could not provide a 'browserless' version of Windows." Pls. Br. at 103. They contend that "[a] 'browserless Windows' is Windows with no accessible browsing functionality, regardless of how that is accomplished." *Id*. at 104. According to plaintiffs, "[a]dding or removing the means of user access to a given function, by whatever means, amounts to adding or removing the software product," even if no software code is removed. *Id*. Thus, under plaintiffs' view, IE would be "removed" from Windows even though all of the relevant software code remains in the operating system and continues to expose APIs to applications and provide important functionality to other parts of Windows. In other words, plaintiffs contend that Microsoft violated Section 1 because it failed to provide a version of Windows in which "user access" to some of its Web browsing functionality was hidden or disabled. *Id*. at 103. Plaintiffs cite no authority for the startling proposition that the antitrust laws required Microsoft to offer consumers a product with useful functionality hidden.

Plaintiffs' focus on hiding "user access" is a departure from the position they took at trial. For instance, the DOJ alleged in its complaint that it is "technically feasible and practicable *to remove Microsoft's Internet browser software from Windows 98*," but that "OEMs are prevented from doing so by Microsoft's contractual tie-in." DOJ Compl. ¶ 20 (emphasis added). Similarly, plaintiffs' technical expert, Edward Felten, insisted that his so-called "prototype removal program" showed "that Microsoft can deliver a version of Windows 98 *from which the IE Web browser has been removed*, and they can deliver that in a way which does not affect the non Web-browsing functionality of Windows 98." 6/10/99 am Tr. at 9 (emphasis added). By arguing that only "user access" to Web browsing functionality can or should be removed, plaintiffs now acknowledge that Microsoft's so-called "Internet browser" should remain in Windows because it provides essential functionality to both applications and other parts of the operating system.

This Court has already stated that requiring Microsoft merely "to hide the allegedly tied product" by, for example, running the Add/Remove Programs utility, "suggests the oddity of treating as separate products functionalities that are integrated in the way Windows 95 and IE are." 147 F.3d at 952 n.18. As this Court previously observed, plaintiffs do not seek to "remove the IE software code, which indeed continues to play a role in providing non-browser functionality for Windows." *Id*. at 941. "In fact, browser functionality *itself* persists," and can be summoned up “by running any application (such as Quicken) that contains the code necessary to invoke the functionality.” *Id.* (emphasis in original). As in the prior case, all plaintiffs seek is to “enable the OEMs to make user access to IE more difficult.” *Id.*

Because little, if any, software code is removed in the process, eliminating “user access” to Web browsing functionality does nothing to alleviate the purported “collateral harm” that the district court found results from inclusion of IE in Windows. 84 F. Supp. 2d at 53, 111 (FF 173, 410). (This supposed “harm” simply reflects the engineering tradeoff inherent in adding functionality to Windows: it entails consumption of additional computer resources. *See* MS Revised Proposed Findings of Fact ¶¶ 594-95.) As plaintiffs’ own technical expert, Glenn Weadock, admitted, “merely removing the means of access to Web-browsing software does very little to address” concerns about “computer resource use (disk space, memory, CPU power, et cetera).” 11/16/98 pm Tr. at 23-24.

The absurdity of treating “user access” to Web browsing functionality as the tied product is also highlighted by the relief awarded. Although the district court’s breakup order assigns IE to the so-called “AppsCo,” Pls. Br. at 120, plaintiffs still cannot identify the software code or files that they claim constitute IE, *id.* at 103-04. Presumably, the district court intended for “AppsCo” to receive something more than an icon, which is, after all, nothing but a small picture of a blue “e.” And the restrictions on the ability of the so-called “OpsCo” to develop modified versions of IE are incomprehensible if there is no delineation of what software code or files constitute IE. *See* MS Comments on Pls. Revised Proposed Final J. at 7-8.

Plaintiffs’ arguments about hiding “user access” to functionality do nothing to undermine the fact that Microsoft has, once again, “clearly met the burden of ascribing facially plausible benefits to its integrated design as compared to an operating system combined with a stand-alone browser such as Netscape's Navigator." 147 F.3d at 950. On this question—which is dispositive under this Court's test—plaintiffs are silent.

B. The Alleged Tie Did Not Have an Anticompetitive Effect on the Putative "Web Browser" Market.

Plaintiffs incorrectly assert that Microsoft disputes only the "separate products" element of their tying claim. Pls. Br. at 97. Microsoft clearly argued in its opening brief that plaintiffs' tying claim fails for an additional reason: the alleged tie did not foreclose competition in the "Web browser" market. MS Br. at 65, 69, 80-83. Moreover, because IE is included in Windows at no charge, there is no forced *purchase* of a separate tied product, as required by tying law. *Id.* at 80-81 (citing cases).

As the Supreme Court recognized in *Jefferson Parish*, "every refusal to sell two products separately cannot be said to restrain competition." 466 U.S. at 11. Thus, the legality of an alleged tie-in "depends on its competitive consequences, not whether it can be labeled 'tying.'" *Id.* at 21 n.34; *accord S. Card & Novelty, Inc.* v. *Lawson Mardon Label, Inc.*, 138 F.3d 869, 874-75 (11th Cir. 1998); *Smith Mach. Co.* v. *Hesston Corp.*, 878 F.2d 1290, 1295 (10th Cir. 1989), *cert. denied*, 493 U.S. 1073 (1990). If the "competitive consequences" of an arrangement are not those to which the tying rule is addressed, "then it should not be condemned irrespective of its label." *Jefferson Parish*, 466 U.S. at 21 n.34. As plaintiffs themselves acknowledge, "the prohibition on tying is concerned with foreclosure of competition on the merits in the tied product." Pls. Br. at 99. Microsoft's inclusion of IE in Windows did not foreclose competition on the merits in developing and marketing Web browsing software. Unlike *Jefferson Parish*, where a surgical patient could be anesthetized by only one anesthesiologist, Windows users are free to install Navigator on their computers and use it instead of, or in addition to, IE.

Plaintiffs do not contest the testimony of Netscape's CEO, James Barksdale, that Navigator is "perfectly interoperable" with Windows. 10/22/98 pm Tr. at 51-52. Nor do plaintiffs deny that OEMs are free to preinstall Navigator on their computers and that many OEMs in fact do so. Pls. Br. at 74. And plaintiffs do not dispute that a user who obtains a personal computer on which Navigator is not preinstalled can use IE (or other software) to download a free copy of Navigator from the Internet. As Microsoft explained, MS Br. at 81, there is no financial disincentive for such a user to switch to different Web browsing software, or to use both IE and Navigator, because both are available free. Chase ¶¶ 162-65. Even if a Windows user does not want to download Navigator from the Internet for some reason, he or she would have no difficulty obtaining a copy of Navigator from another source. Schmalensee ¶¶ 373-78. As Netscape has repeatedly boasted, Navigator is "ubiquitous." 10/21/98 pm Tr. at 14. In short, plaintiffs did not—and cannot—establish that Microsoft's inclusion of IE in Windows prevented Netscape from distributing Navigator broadly and seeking to persuade consumers to use it. *Cf. Roy B. Taylor Sales, Inc.* v. *Hollymatic Corp.*, 28 F.3d 1379, 1383 n.23 (5th Cir. 1994).

The low usage shares of IE 1 and IE 2 demonstrate that Microsoft's inclusion of Web browsing software in Windows does not itself produce competitive success, much less foreclose competition on the merits in the putative "Web browser" market. *See generally* Schmalensee ¶ 524. Every copy of Windows 95 that was distributed through the OEM channel between August 1995 and August 1996 included either IE 1 or IE 2, Allchin ¶ 322, and OEMs were not permitted to modify Windows by removing the IE icon from the Windows desktop, Rose ¶¶ 25-31; Kempin ¶ 69. Although Microsoft shipped tens of millions of copies of Windows 95 during that period, "less than 5% of people accessing the Web were using Internet Explorer." Allchin ¶ 322. IE's usage share continued to languish in single digits until Microsoft dramatically improved the quality of the Web browsing software included in Windows 95. *See* Schmalensee ¶¶ 288-89; Chase ¶¶ 135-36. Plaintiffs have never overcome the intuitively obvious fact that it was the improved quality of IE, not its inclusion in the operating system, that was principally responsible for Navigator's declining usage share.

II.

The District Court's Monopoly Maintenance Ruling Should Be Reversed.

Plaintiffs admit that the principal basis for the district court's monopoly maintenance ruling was its finding that Microsoft improperly foreclosed Netscape from the OEM and IAP channels of distribution. *E.g.*, Pls. Br. at 79 (district court found that only the "OEM and IAP components" of Microsoft's conduct independently violated Section 2). The district court held that Microsoft foreclosed the IAP channel by entering into promotion and distribution agreements with IAPs and foreclosed the OEM channel by tying IE to Windows (*i.e.*, not permitting OEMs to modify the operating system to remove "user access" to Web browsing functionality). *United States* v. *Microsoft Corp.*, 87 F. Supp. 2d 30, 39-42 (D.D.C. 2000).

The district court, however, rejected plaintiffs' claim that Microsoft's agreements with IAPs unreasonably restrained trade in violation of Section 1. And it is equally clear, as explained above, that Microsoft's inclusion of Web browsing software in Windows did not amount to an unreasonable restraint of trade either. Plaintiffs cite no authority for their assertion that conduct that does not unreasonably restrain trade under Section 1—because it is not exclusionary—can nevertheless be "anticompetitive" under Section 2. Nor do they respond to Microsoft's argument, based on settled Supreme Court case law, that "'[c]oncerted activity subject to § 1 is judged *more sternly* than unilateral activity under § 2' because '[c]oncerted activity inherently is fraught with anticompetitive risk.'" MS Br. at 97 (quoting *Copperweld Corp.* v. *Indep. Tube Corp.*, 467

U.S. 752, 768-69 (1984) (emphasis added)). Stripped of its two principal pillars—foreclosure of the OEM and IAP channels—there is little left of plaintiffs' monopoly maintenance claim.

A. Microsoft Does Not Possess "Monopoly Power."

Plaintiffs agree that "monopoly power is the 'power to control prices or exclude competition.'" Pls. Br. at 51 (quoting *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992)). Microsoft does not possess such power in a properly-defined product market.

1. Products Need Not Be Complete Substitutes To Be Included in the Same Product Market.

The district court adopted the narrowest possible product market: "Intel-compatible PC operating systems." 87 F. Supp. 2d at 36. The district court thus excluded not only competitive operating systems such as Apple's Mac OS, but also the two middleware technologies—Navigator and Java—that were the focus of plaintiffs' monopoly maintenance claim and that were found to be the most serious competitive threats to Microsoft's operating systems. 84 F. Supp. 2d at 28-30 (FF 68-77). Plaintiffs do not cite a single case in which the most serious competitive threats to an alleged monopoly product were excluded from the relevant product market. The antitrust laws do not countenance such a restrictive approach to market definition.

Although they state that Navigator and Java "threatened the Windows monopoly," Pls. Br. at 53, plaintiffs argue that the district court properly excluded middleware from the relevant product market because middleware is "a complement to, rather than a substitute for, an operating system," *id.* at 54. Plaintiffs acknowledge, however, that one of the principal functions of an operating system is to "serve[] as a platform for applications." *Id.* at 9. And they similarly argue that the platform characteristics of Web browsing software are a "critical dimension" of its value. *Id.* at 90. As a result, middleware "is not only a complementary product, but also is a potential substitute for a crucial function of the operating system: [it] could serve as a platform for software applications developers." AOL, CCIA, ProComp & SIIA Br. at 15. Indeed, that is the central tenet of plaintiffs' monopoly maintenance claim.

Plaintiffs argue that the district court "properly excluded middleware from the market" because "no middleware product currently serves the same purposes as the Windows operating system." Pls. Br. at 53. The Sherman Act does not require, however, that "products be fungible to be considered in the relevant market." *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956). If the law were otherwise, "only physically identical products would be part of the market," *id.*, which would result in too narrow a market in which to measure an alleged monopolist's power. *See also United States* v. *Continental Can Co.*, 378 U.S. 441, 457 (1964) ("complete inter-industry competitive overlap need not be shown").

Courts have rejected efforts to exclude from the relevant product market partial substitutes that significantly constrain a defendant's power over price. For example, in an antitrust action brought by Transamerica against IBM, the court rejected Transamerica's attempt to limit the relevant product market to complete computer systems (*i.e.*, the combination of hardware and software needed to satisfy a customer's data processing requirements):

> Transamerica's definition of the systems market is, however, too narrow. Only suppliers of complete systems are included, suppliers of parts of systems are ignored. Firms which offer the user parts of systems have become a major competitive force in the computer industry, and, because they significantly constrain IBM's power to control the price of the systems it sells, a market definition that ignores them is incorrect.

In re IBM Peripheral EDP Devices Antitrust Litig., 481 F. Supp. 965, 977-78 (N.D. Cal. 1979) [hereinafter *Transamerica*], *aff'd sub nom*. *Transamerica Computer Co.* v. *IBM*, 698 F.2d 1377 (9th Cir.), *cert*. *denied*, 464 U.S. 955 (1983). As the *Transamerica* court properly observed, "A market definition should 'recognize competition where, in fact, competition exists,' and should include all significant competition even though that competition differs in form or nature." *Id.* at

978 (footnotes omitted) (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 326 (1962)). "By assuming that only manufacturers offering complete systems compete with IBM," the court stated, Transamerica ignores a "significant constraining force." *Id.* Plaintiffs ignore a significant constraining force on Microsoft by arguing that only complete operating systems (indeed, only operating systems that run on a particular type of microprocessor) compete with Windows.

The relevant market inquiry "boils down to whether there are products that restrain a defendant's ability to act without regard for other manufacturers and suppliers." *ILC Peripherals Leasing Corp.* v. *IBM*, 458 F. Supp. 423, 428 (N.D. Cal. 1978), *aff'd sub nom*. *Memorex Corp.* v. *IBM*, 636 F.2d 1188 (9th Cir. 1980), *cert*. *denied*, 452 U.S. 972 (1981). Competing middleware technologies constrain Microsoft's actions and thus must be included in the relevant product market. MS Br. at 84-88. As Microsoft has explained, the only sensible product market definition includes all platforms for developing and running applications. *Id.* at 87

2. Plaintiffs Have Not Satisfied Their Burden of Establishing Significant Barriers to Entry.

Plaintiffs do not deny that they bore the burden of proving that there are significant barriers to entry into the putative market. *See United States* v. *Baker Hughes Inc.*, 908 F.2d 981, 987-89 (D.C. Cir. 1990). Although plaintiffs now insist that they "alleged and proved other barriers," Pls. Br. at 57, the district court's findings leave no doubt that it found only *one* barrier here—the applications barrier to entry, *see* 84 F. Supp. 2d at 19-23 (FF 34, 36-50).

The nature of the purported applications barrier to entry is clear from plaintiffs' brief: consumers currently *prefer* Windows over competing platforms because it supports a large array of compatible applications (the so-called "network effect"). Pls. Br. at 57, 58; *see also* 84 F. Supp. 2d at 19-20, 23 (FF 37, 50). As plaintiffs acknowledge, a critical attribute of an operating system is its ability to run applications. Pls. Br. at 9. Windows is successful because Microsoft has excelled at developing innovative platform technologies, distributing those technologies broadly and persuading ISVs to create applications that utilize them. Maritz ¶¶ 124-86. Although plaintiffs quote this Court's statement that "'[a]ny market condition that makes entry more costly or time-consuming . . . should be considered a barrier to entry,'" Pls. Br. at 58 (quoting *S. Pac. Communications*, 740 F.2d at 1001), they fail to cite a single case in which consumer demand for an attribute of a product (here, support for a variety of applications) alone was found to constitute a barrier to entry.

Plaintiffs' defense of the district court's "empirical evidence" that supposedly supports the applications barrier to entry is equally unpersuasive. *See* 84 F. Supp. 2d at 22-23 (FF 45-50). Plaintiffs note that the district court rejected Microsoft's assertion that "the Linux 'open source' OS has created a 'serious platform threat to Windows,'" Pls. Br. at 58, but they do not dispute that Netscape was able to mount a "serious platform threat" to Windows within a year of its formation as a six-person startup, MS Br. at 94. In addition, plaintiffs do not deny that Linux, which was initially written by a Finnish graduate student in his spare time, was able to *enter* the putative market and now competes with Windows, particularly as a server operating system. 84 F. Supp. 2d at 23 (FF 50). Even f Linux has not yet made significant inroads as a desktop operating system, it "can nevertheless exert competitive pressure on that market." *Baker Hughes*, 908 F.2d at 988.

Lastly, plaintiffs do not even try to reconcile their assertion that ISVs have no incentive to write applications for platforms other than Windows with their proffered basis for breaking up Microsoft—*i.e.*, their contention that after the breakup, "AppsCo" would have an incentive to port its applications "to other platforms, such as Linux or sub-PC-operating systems installed on personal digital assistants or wireless telephones." Pls. Br. at 121. If the only thing preventing

Microsoft from "respond[ing] to *ordinary market incentives* to port its powerful and widely used applications" to other platforms such as Linux is "a stake in the Windows monopoly," *id.* (emphasis added), then the thousands of ISVs around the world with no such stake are presumably acting in accordance with those "ordinary market incentives" already.

3. Microsoft's Behavior Confirms That It Faces Intense Competition.

Plaintiffs do not dispute that Microsoft—in their view a monopolist protected by a virtually insurmountable entry barrier—devotes billions of dollars annually to research and development, more than all its competitors. MS Br. at 89. They instead assert that "[a] monopolist has powerful incentives to invest in R&D to improve its product." Pls. Br. at 61. To the contrary, monopoly is "expected to result in technological stagnation. Without a competitive spur, the monopolist is thought not to have any incentive to innovate." *Transamerica*, 481 F. Supp. at 976-77.

Plaintiffs also do not dispute that the district court found that they failed to show that Microsoft charged a "monopoly price" for Windows. *See* 84 F. Supp. 2d at 27 (FF 65). Moreover, in the absence of any finding that Microsoft has control over productive capacity, plaintiffs cannot contend—and the district court did not find—that Microsoft can "raise price by reducing output," *Eastman Kodak*, 504 U.S. at 487 (Scalia, J., dissenting), the hallmark of monopoly power. *See Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 233 (1993) ("Supracompetitive pricing entails a restriction in output.").

Microsoft invests heavily in research and development and keeps the price of Windows low because it must contend not only with numerous existing and potential platform competitors, but also with prior versions of Windows. Because software never wears out, Microsoft must continue to improve Windows and price it attractively to give existing customers an incentive to purchase a new computer or otherwise obtain a new version of the operating system. *See* MS Br. at 91. "If a dominant supplier acts consistent with a competitive market," as Microsoft does, "the purpose of the antitrust laws is amply served." *United States* v. *Syufy Enters.*, 903 F.2d 659, 668-69 (9th Cir. 1990).

Plaintiffs place great emphasis on Microsoft's "market share." Pls. Br. at 55-56. Given the nature of competition in the software industry, it is not surprising—and not at all indicative of "monopoly power" in the antitrust sense—that one firm has a large share of sales. 84 F. Supp. 2d at 25-26 (FF 59); Schmalensee ¶¶ 32-36, 63-73. Software firms compete for leadership in categories such as word processors, spreadsheets, personal finance software and operating systems, as well as in brand new categories. Schmalensee ¶32. If successful, software firms often obtain a high share of a particular category and, with it, high profits given the very low marginal cost of reproducing software. Schmalensee ¶ 32. As then Treasury Secretary Lawrence Summers recently explained, "the only incentive to produce anything" in the "new economy" is the prospect of earning the high profits that arise from risk taking and success in achieving market leadership "because without that power the price will be bid down to marginal cost and the high fixed costs cannot be recouped." Lawrence H. Summers, "The Wealth of Nations" (Remarks, May 10, 2000). This is not to say, however, that category leaders can cease innovating or that they can raise the price of their products without fear of being displaced. Schmalensee ¶¶ 32, 36. To the contrary, history shows that category leaders that fail to innovate or to price their products attractively are frequently displaced, oftentimes by so-called "niche players" or by technological advances that redefine an entire category or render it obsolete. Schmalensee ¶¶ 66, 71-73; Maritz ¶¶ 75-105.

Because of this dynamic competition, the rate of innovation in the software industry is remarkably high, and has been an engine of growth and increased productivity for the Nation's economy. *See* MS Br. at 11-12. What the *Transamerica* court said about the computer industry in 1979 rings true about the software industry today:

> This is not the story of a stagnant, dominated industry. There is no doubt that the pace of technological progress in the computer industry is extraordinary. Commentators are fond of saying that had the auto industry kept the same pace over the last 30 years, a Rolls Royce would cost $2.50 today and would have an EPA gas rating of 2,000,000 miles per gallon.

481 F. Supp. at 982. By giving undue weight to plaintiffs' "market share" evidence and adopting a static view of the marketplace, the district court ignored competitive realities that require Microsoft to innovate and price its software attractively.

B. Microsoft Did Not Engage in Anticompetitive Conduct.

In arguing that Microsoft engaged in anticompetitive conduct in violation of Section 2, plaintiffs cite no cases involving conduct similar to the conduct at issue here. Rather, they rely on abstract definitions of "anticompetitive" or "exclusionary" conduct set out in cases such as *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). *See* Pls. Br. at 47-48. Courts have cautioned, however, against reading cases like *Aspen* too broadly. *E.g.*, *Olympia Equip. Leasing Co.* v. *W. Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986) (Posner, J.), *cert. denied*, 480 U.S. 934 (1987). Standing alone, the language in *Aspen* on which plaintiffs rely provides an insufficient basis to distinguish lawful from unlawful conduct—and insufficient guidance to businesspeople (and their counsel) attempting to conform their conduct to the dictates of the law. Plaintiffs fail to address any of the Section 2 cases that articulate controlling legal standards applicable to the specific kinds of conduct challenged in this case, even though such cases exist and were relied on by Microsoft. MS Br. at 101-02, 109-10 (citing cases involving technological tying and exclusive dealing claims under Section 2).

Microsoft's conduct was not "anticompetitive" or "exclusionary" for one simple reason: nothing Microsoft did excluded Netscape—the focus of the case—from the marketplace. Although plaintiffs do not dispute this crucial fact, they attempt to sidestep it by claiming that "Microsoft took actions to exclude Navigator" from the OEM and IAP channels of distribution. Pls. Br. at 63. But, even assuming that Navigator was excluded from those two channels—which it was not—Netscape was able to distribute huge quantities of Navigator to consumers through numerous other channels. *See* MS Br. at 97. Unable to refute this fact, plaintiffs set up a straw man: they argue that Microsoft violated Section 2 even though "it did not *completely* foreclose Netscape's distribution of Navigator." Pls. Br. at 68 (emphasis in original); *see also id.* at 42-43, 73-76, 78-79. Microsoft has never contended that Section 2 requires *total* exclusion from the marketplace. MS Br. at 97, 107-10. What is required is a showing of *substantial* exclusion, and that is what is missing from this case. The district court did not find that Microsoft excluded Netscape from *any* percentage of the marketplace, much less a substantial percentage. Instead, the district court expressly acknowledged that Netscape was able to distribute Navigator "to *every* PC user worldwide." 87 F. Supp. 2d at 53 (emphasis added).

Confronted with the district court's finding that "Netscape was able to distribute 160 million copies of Navigator" in 1998 alone despite Microsoft's supposed foreclosure of the OEM and IAP channels, *id.*, plaintiffs argue that Microsoft's conduct was anticompetitive because it supposedly prevented Navigator from being widely used. Pls. Br. at 31, 63, 75-76, 78. The antitrust laws, however, ensure competitors access to the marketplace; they do not guarantee that consumers will use their products. Consumers may choose not to use a particular product for a variety of reasons unrelated to a competitor's access to distribution channels. If competitors can reach the ultimate consumers of their products by distributing directly to them, competing for the services of existing distributors or developing alternative distribution channels, the "[a]ntitrust laws require no more." *Omega Envtl., Inc.* v. *Gilbarco, Inc.*, 127 F.3d 1157, 1163 (9th Cir. 1997), *cert. denied*, 525 U.S. 812 (1998); *see also Stitt Spark Plug Co.* v. *Champion Spark Plug Co.*, 840 F.2d 1253, 1257-58 (5th Cir.), *cert. denied*, 488 U.S. 890 (1988); *Ryko Mfg. Co.* v. *Eden Servs.*, 823 F.2d 1215, 1233-35 (8th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988); *Roland Mach. Co.* v. *Dresser Indus., Inc.*, 749 F.2d 380, 393-95 (7th Cir. 1984).

In any event, Navigator *is* widely used. The district court found that Navigator's installed base of users increased from 15 million in 1996 to 33 million in December 1998, 87 F. Supp. 2d at 53; 84 F. Supp. 2d at 103 (FF 378), the period in which Microsoft was supposedly engaged in a "multifaceted campaign of exclusionary conduct," Pls. Br. at 62. Netscape's CEO, Barksdale, testified to even higher figures, estimating in October 1998 that there were "somewhere between 40 and 70 million" Navigator users. 10/21/98 pm Tr. at 13. There is also no truth to plaintiffs' suggestion that the OEM and IAP channels are the only channels effective in generating usage of Web browsing software. Pls. Br. at 15, 63. Netscape informed AOL during AOL's due diligence investigation that "currently about 50% of our installed base" of users obtained Navigator by downloading it from the Internet. DX 2538 at 36457; *see also* DX 2810 at 79. As Netscape's co-founder, James Clark, testified, the Internet is the most efficient distribution system for software in the world. DX 2562 at 41-42. Plaintiffs ignore this evidence.

Leaving aside plaintiffs' failure to show that Netscape was excluded from any portion of the marketplace—which by itself is fatal to their Section 2 claims—plaintiffs' specific allegations of anticompetitive conduct cannot withstand scrutiny.

1. Microsoft Did Not Exclude Navigator from the OEM Channel.

Plaintiffs assert that Microsoft "effectively exiled Netscape from the OEM channel." Pls. Br. at 62. First, they challenge the manner in which Microsoft included Web browsing software in Windows 98, *id*. at 66, claiming that Microsoft is guilty of "predatory product design," *id*. at 67. Second, plaintiffs contend that Microsoft's OEM license agreements improperly prohibited "OEMs from modifying Windows in any unauthorized way." *Id*. at 68. Third, plaintiffs contend that Microsoft "offered OEMs valuable incentives and discounts" to "limit distribution of Navigator." *Id*. at 17-18. None of these contentions has merit.

Predatory Product Design. Plaintiffs concede that "Microsoft's conduct in developing a Web browser and offering it to OEMs and users with Windows [was] lawful." *Id*. at 66. They also concede that Microsoft's provision of Web browsing software with Windows benefited consumers. *Id*. Recognizing that courts generally refuse to second-guess engineers' product design decisions in antitrust cases, *e.g*., *ILC Peripherals*, 458 F. Supp. at 439, plaintiffs now insist that they are challenging only "very limited aspects of Microsoft's product design," Pls. Br. at 66, an assertion that cannot be reconciled with their request that Microsoft be broken up and subjected to wide-ranging product design regulations.

Plaintiffs' "predatory product design" claim fails for the same reasons that their "technological tying" claim fails under Section 1. Plaintiffs cite no authority for their suggestion that a different, more stringent standard should apply to product design decisions under Section 2 than applies under Section 1. To the contrary, one of the cases plaintiffs cite, *H.J., Inc.* v. *ITT*, 867 F.2d 1531, 1542 (8th Cir. 1989), applied the Section 1 standard to a tying claim under Section 2. Nor do plaintiffs articulate a standard that could be applied in the future to distinguish beneficial innovations from "predatory" design changes or enable software developers to determine what functionality may be added to leading products and whether a mechanism must be provided to remove "user access" to that functionality. *See* Pls. Br. at 66. Lastly, plaintiffs do not deny that there are technical reasons why Windows 98 invokes its IE components by default in a handful of instances. *See* MS Br. at 82-83; Pls. Br. at 108-09. Plaintiffs thus provide no basis to outlaw the design of Windows 98, even if courts are permitted under the Sherman Act to evaluate product design decisions under some vague and amorphous standard.

The law is settled that design changes that improve a product cannot violate Section 2, regardless of the defendant's intent. *E.g.*, *Transamerica*, 481 F. Supp. at 1005 ("Mallard was a design adopted primarily to preclude PCM competition, but it was a superior design, and its effect on competition was negligible. A finding adverse to IBM on this aspect of its conduct would amount to punishment for intent alone."). To hold otherwise would chill technical innovation. That is why courts have roundly rejected allegations of "predatory innovation" or "predatory design." *See* Joseph Gregory Sidak, *Debunking Predatory Innovation*, 83 COLUM. L. REV. 1121, 1121 n.2 (1983) (citing cases). Plaintiffs do not dispute that Microsoft's design of Windows to include Web browsing functionality improved the operating system and benefited consumers. Pls. Br. at 66. Plaintiffs contend that Microsoft lacked "a legitimate business justification" for its design of Windows, *id.* at 67, but it is plaintiffs' suggestion—that Microsoft was required to create a mechanism for hiding "user access" to useful functionality in the operating system—that makes no business sense.

Microsoft's OEM License Agreements. Plaintiffs do not dispute that "Microsoft's license agreements have never prohibited OEMs from pre-installing programs, including Navigator, on their PCs and placing icons and entries for those programs on the Windows desktop and in the 'Start' menu." 84 F. Supp. 2d at 63 (FF 217). Nor do they dispute that Microsoft's license agreements do "not forbid the OEM to set Navigator as the default browsing software." *Id.* Plaintiffs instead claim that Microsoft's license agreements are unlawful because they do not permit OEMs to delete or modify parts of Windows without authorization. Pls. Br. at 16-17. In particular, plaintiffs challenge the so-called "Windows Experience" provisions of Microsoft's license agreements, which require that "the very first time a consumer turns on his or her computer, Microsoft's Windows operating system . . . be allowed to go through the initial startup sequence as designed, developed and tested by Microsoft and to display the Windows desktop without any aspect of that screen having been deleted by the OEM." Kempin ¶ 38.

a. Plaintiffs concede that Microsoft's inclusion of Web browsing functionality in Windows did not violate the antitrust laws. Pls. Br. at 102. They nevertheless argue that Microsoft was required to permit OEMs, which act as Microsoft's distributors, to delete "user access" to that functionality. By claiming that Microsoft must permit OEMs to make unauthorized modifications to its copyrighted operating systems, plaintiffs seek to deprive Microsoft of its rights under federal copyright law.

Contractual provisions limiting the ability of a licensee to modify copyrighted works without the licensor's permission are common in the software industry, and are found in the OEM license agreements of other leading operating system vendors. Kempin ¶25; *see, e.g.*, DX 1661 at 4; DX 1777 at 102. From an antitrust perspective, Microsoft's possession of this legal right contributes to its "efficiency in the same way that possession of any other asset does." *Neumann* v. *Reinforced Earth Co.*, 786 F.2d 424, 427 n.3 (D.C. Cir. 1986). As this Court has explained, "the legitimate assertion of a legal right against a competitor, however damaging to the competitor, or even to competition, that may be, does not constitute monopolizing or attempting to monopolize within the meaning of the Sherman Act." *Id.*

According to plaintiffs, "Microsoft neither articulated a tenable copyright theory that supports its asserted defense, nor offered evidence to support such a theory." Pls. Br. at 69. That assertion is demonstrably false. From the outset of the case, Microsoft argued that plaintiffs' "challenges to Microsoft's license agreements with computer manufacturers are without legal merit by reason of Microsoft's rights under the federal copyright laws." Answer to DOJ's Compl. at 34. As Microsoft argued in seeking summary judgment, "[t]he 'bundle of rights' possessed by the holder of a valid copyright includes the right to prevent unauthorized modifications to its copyrighted work." MS Mem. in Supp. of Mot. for Summ. J. at 54. At trial, Microsoft introduced into evidence Certificates of Registration from the United States Copyright Office for both Windows 95 and Windows 98. 2/24/99 am Tr. at 63-66; DX 813; DX 814; *see also* 84 F. Supp. 2d at 66 (FF 228); Kempin ¶ 2; 2/25/99 am Tr. at 57-58. The admission of these copyright registrations "shift[ed] to [plaintiffs] the burden of proving the invalidity of the copyright[s]." *Fonar Corp.* v. *Domenick*, 105 F.3d 99, 104 (2d Cir.), *cert. denied*, 522 U.S. 908 (1997). Plaintiffs never contended—much less proved—that Microsoft's copyrights are invalid.

Rather, plaintiffs argue that copyright law permits a licensee to make "minor modifications" to a copyrighted work without authorization from the copyright holder. *See* Pls. Br. at 69-72. According to plaintiffs, "deleting a single icon from Windows 95" and "providing users with additional information in the boot sequence of Windows" are "minor modifications [that] would hardly frustrate the objectives of the Copyright Act." *Id.* at 72. Leaving aside the irony that plaintiffs contend Microsoft violated Section 2 and should be broken up because it did not permit OEMs to make what they now call "minor modifications" to Windows, plaintiffs are wrong on both the facts and the law. The Second Circuit's reference in *Gilliam* to "mutilation of [the] work" (quoted at Pls. Br. at 70) was not contained in the discussion of the copyright infringement claim, but rather in the discussion of the separate claim under the Lanham Act. *Gilliam* v. *ABC*, 538 F.2d 14, 23-24 (2d Cir. 1976). And, contrary to plaintiffs' assertion, Pls. Br. at 70, the Seventh Circuit in *WGN* did not find that the "teletext" included by WGN in the vertical blanking interval of its 9:00 p.m. news broadcast was a "substantial portion of the work." *WGN Cont'l Broad. Co*. v. *United Video, Inc.*, 693 F.2d 622, 624-28 (7th Cir. 1982).

Nor can the modifications at issue be dismissed as inconsequential. *E.g.*, Kempin ¶ 37. As plaintiffs acknowledge, "[b]etween 1995 and 1999, Microsoft spent more than $100 million each year" developing the IE technologies in Windows. Pls. Br. at 15. Having made that substantial investment, Microsoft had a legitimate business interest in preventing OEMs from modifying Windows to deny "user access" to the functionality provided by IE. In addition, "Microsoft advertises Windows as including Internet Explorer, and many product reviews of Windows 98 discuss that feature of the operating system." Kempin ¶ 69. Plaintiffs do not deny that "considerable customer confusion would result and Microsoft's brand image could suffer if customers purchasing a new computer preinstalled with Windows could not find and utilize the Internet Explorer functionality that Microsoft advertises as part of the operating system." Kempin ¶ 69.

b. Wholly apart from Microsoft's rights under federal copyright law, the challenged provisions of Microsoft's license agreements do not limit Netscape's access to the OEM channel. *See* DX 10 at 48339. Plaintiffs do not dispute that "OEMs were permitted to pre-install Navigator on PCs and that many OEMs did so." Pls. Br. at 74. In fact, plaintiffs' own exhibits show that Compaq, Fujitsu, Gateway, Hewlett-Packard, IBM and Sony—six of the world's largest OEMs—distributed Navigator on some of their personal computers. GX 421 at 680; GX 2116 at 201070-71; *see also* Kempin ¶ 21. Rather, plaintiffs contend that, as the quality of IE improved, many OEMs decided either not to preinstall Navigator or to feature it less prominently on their personal computers because Windows already included IE. *See* Pls. Br. at 20, 74-75. Even if true, that contention does not establish an antitrust violation.

To support their claim that Navigator was "exiled" from the OEM channel, plaintiffs challenge the authenticity of the document prepared during AOL's due diligence investigation of Netscape that reports that Navigator was present on "22% of OEM shipments." DX 2440 at 341778. Plaintiffs assert that "[n]othing in the record explains the source or method of the '[e]stimate' in this anonymous document, which was not subject to cross-examination." Pls. Br. at 75; *see also id.* at 78. To the contrary, Barry Schuler, a senior AOL executive, testified that this so-called "anonymous document" represents a "summary of the findings and proposed financials and operating plans" resulting from AOL's November 1998 due diligence investigation of Netscape. DX 2810 at 74-75. Schuler also stated that AOL used this document to "make our final determination of whether to proceed ahead with" the $10 billion acquisition of Netscape. DX 2810 at 75. Plaintiffs themselves identified the document in their proposed findings of fact as "the due diligence report by Goldman Sachs on the Netscape/AOL transaction," Pls. Joint Proposed Findings of Fact ¶ 380.5.i, and the district court credited the statement in the document that Netscape distributed 160 million copies of Navigator in 1998, 87 F. Supp. 2d at 53.

No Restriction on Distribution of Navigator. Plaintiffs suggest that Microsoft's OEM license agreements "restricted Navigator's distribution." Pls. Br. at 73. That suggestion is contradicted by the facts, as the district court found. 84 F. Supp. 2d at 63 (FF 217). Plaintiffs also suggest that Microsoft dissuaded Compaq, Gateway and IBM from distributing Navigator. Pls. Br. at 18. In fact, plaintiffs go so far as to state that Microsoft had an exclusive contract with Compaq requiring it to ship only IE. *Id.* at 77. These statements are likewise false. The undisputed evidence establishes that Compaq, Gateway and IBM all distribute Navigator. Kempin ¶ 21; 2/19/99 am Tr. at 49-50; 6/9/99 pm Tr. at 63. Furthermore, Compaq's John Rose and

Stephen Decker both testified that Microsoft never limited in any way Compaq's ability to preinstall Navigator on its new computers. Rose ¶¶ 32-33; DX 2564 at 44, 45, 50.

2. Microsoft Did Not Exclude Navigator from the IAP Channel.

Plaintiffs contend that Microsoft's agreements with ISPs and OLSs (collectively referred to by the district court as "IAPs") improperly excluded Navigator from an important distribution channel in violation of Section 2. They concede, however, that the district court *rejected* their claim that those same agreements violated Section 1. Pls. Br. at 5. They also do not dispute that courts apply exactly the same standard to alleged exclusive dealing agreements under Section 2 as they do under Section 1. MS Br. at 109-10 (citing cases).

In an attempt to salvage their monopoly maintenance claim, plaintiffs argue that the district court's "Section 1 ruling addressed the effects of Microsoft's conduct in the *Web browser market*, but the Section 2 monopoly maintenance violation concerns the *operating system market*." Pls. Br. at 77-78 (emphasis in original). This is pure sophistry. Under plaintiffs' theory of the case—adopted by the district court—the challenged conduct had an anticompetitive effect in the alleged operating system market because it allegedly prevented Navigator from becoming the "standard" Web browsing software in a separate "Web browser" market. *Id.* at 14. Thus, accepting plaintiffs' theory, if the challenged agreements did not unreasonably retrain trade in the alleged "Web browser" market—as the district court concluded—they could not possibly have had a derivative anticompetitive effect in the alleged operating system market.

Plaintiffs also take issue with the fact that, notwithstanding Microsoft's agreements with IAPs, Netscape was able to distribute large quantities of Navigator through the IAP channel. Once again, they seek to dismiss as an "anonymous document" (Pls. Br. at 78) the same report summarizing AOL's due diligence investigation of Netscape, which estimated that Navigator accounted for a "24% share of top 20 ISP's distribution." DX 2440 at 341778. Plaintiffs argue that this document "establish[es] only that, after Microsoft dropped some of its restrictions in the spring of 1998, Navigator was not totally excluded from the IAP channel." Pls. Br. at 78. Contrary to plaintiffs' assertion, Navigator was *never* excluded from the IAP channel. At a time when Microsoft was struggling to obtain "measurable browser share," DX 1545 at 2006380, Microsoft entered into the challenged agreements with only ten of the more than 4,500 ISPs in North America and with four leading OLSs, 84 F. Supp. 2d at 72-73, 85 (FF 256, 305); Myhrvold ¶ 8. The agreements expressly permitted the IAPs to distribute Navigator to their subscribers upon request, MS Br. at 34, 35, and Navigator's share of the subscriber base of IAPs did not vary significantly depending on whether the IAP had entered into an agreement with Microsoft, Schmalensee ¶¶ 445-62 & App. D ¶¶ 100-14. To the extent Microsoft's ISP agreements could be said to have had any adverse effect on Navigator's distribution, that effect disappeared when Microsoft waived the distribution provisions of those agreements in April 1998, approximately 18 months after they went into effect. Myhrvold ¶ 91.

3. Plaintiffs' Other Allegations Do Not Amount to a Section 2 Violation.

Plaintiffs also premise their monopoly maintenance claim on (i) Microsoft's agreements with certain ICPs and ISVs, (ii) aspects of Microsoft's Java implementation, and (iii) Microsoft's 1997 technology agreement with Apple. *See* Pls. Br. at 42, 65, 79-83. They concede, however, that the district court concluded that these matters "failed to have a 'significant exclusionary impact,'" and thus cannot "be *independent* bases for liability" under Section 2. *Id.* at 81 (emphasis in original). Plaintiffs nevertheless argue that "a series of actions, which standing alone would not be unlawful, can . . ., in combination, result in a violation of the Sherman Act." *Id.* at 82. The Federal Circuit recently rejected a similar "monopoly broth" theory in *Intergraph Corp.* v. *Intel Corp.*, 195 F.3d 1346, 1366-67 (Fed. Cir. 1999), a case plaintiffs ignore. Plaintiffs not only are wrong on the law, *see* MS Br. at 112-14; they also have not shown that any of the challenged acts were anticompetitive.

Microsoft's Agreements with Certain ICPs and ISVs. The district court expressly found that plaintiffs failed to prove that Microsoft's agreements with the 24 ICPs included in the Channel Bar "actually had a substantial, deleterious impact on Navigator's usage share." 84 F. Supp. 2d at 92 (FF 332). That finding defeats any claim that those agreements had antitrust significance, under Section 1 or Section 2.

Similarly, plaintiffs' assertion that Microsoft "contractually required ISVs to use Internet Explorer-specific technologies in return for timely and commercially necessary technical information about Windows" and "precluded important ISVs from distributing Navigator with their products" is false and not supported by any testimony. Pls. Br. at 30 (citing GX 2071 & GX 2400). Microsoft entered into the agreements in question—the so-called "First Wave" agreements—with only a fraction of the thousands of ISVs that write applications for Windows. 84 F. Supp. 2d at 93 (FF 339). Pursuant to those agreements, the ISVs received certain technical and marketing support from Microsoft in exchange for their commitment to, among other things, use IE 4 as "the default browser" if their application's user interface was "HTML based." GX 2071 at 3. The "First Wave" agreements did not preclude ISVs from distributing Navigator with their products, and there is no finding or evidence that those agreements had *any* adverse effect on Navigator's distribution, much less a substantial one.

Microsoft's Java Implementation. Plaintiffs do not dispute that Microsoft's Java Virtual Machine ("JVM") permits cross-platform Java applications to run on Windows. Pls. Br. at 80. Nor do they deny that Microsoft's Java development tools, Visual J++ 6.0, enable ISVs to write cross-platform Java applications. *Id.* Plaintiffs nevertheless insist that Microsoft improperly obstructed the development of cross-platform Java applications. *See id.* at 35-38, 79-80. In particular, they claim that Microsoft designed Visual J++ 6.0 so that ISVs would "unwittingly" write Java applications that run only on Windows, *id.* at 80, and that Microsoft's mechanism for allowing Java applications to make native calls to Windows APIs, called J/Direct, created an "intentional incompatibility" with Sun's mechanism, called JNI, *id.* at 67.

As to the first claim, plaintiffs cite no evidence—or finding by the district court—that any ISV that wanted to write a cross-platform Java application ever unintentionally wrote one that ran only on Windows by mistakenly using the optional keywords or compiler directives in Visual J++ 6.0. *See* MS Br. at 54-55. As to the second claim, a Java application that makes native calls to Windows (using J/Direct *or* Sun's JNI) by definition will not run on any other operating system, so the differences between the two have no bearing on the creation of *cross-platform* Java applications, which is what Microsoft allegedly sought to obstruct. For ISVs that chose to write Java applications that rely on Windows system services, Microsoft's creation of J/Direct was plainly beneficial because, as plaintiffs admit, Java applications utilizing J/Direct "ran faster than applications written to use the Sun-compliant methods of access [*i.e.*, JNI]." Pls. Br. at 37. Building a better mousetrap cannot be condemned because it is "incompatible" with an alternative, technically inferior product supplied by a competitor.

Plaintiffs also wrongly assert that Microsoft "threatened" or "pressured" Intel into not supporting cross-platform Java. *Id.* at 36-37, 80. Microsoft simply advised Intel that, in Microsoft's view, supporting Sun's Java strategy was contrary to Intel's own interests. *See* MS Br. at 55. In the past, Intel has offered Microsoft similar unsolicited advice on a range of subjects. *E.g.*, DX 985 at 173567. There is no evidence that either Intel or Microsoft has ever felt compelled to follow such advice.

Microsoft's Agreements with Apple. Attempting to rely on alleged conduct outside the market defined by the district court to support their monopoly maintenance claim, plaintiffs contend that Microsoft induced Apple to "remove Navigator from the default installation of the Mac OS 8.5" by threatening to cancel Mac Office 97. Pls. Br. at 29. For one thing, plaintiffs ignore the important role that Apple's threat of a $1.255 billion patent infringement action played in discussions leading up to the companies' three August 1997 agreements, *see* MS Br. at 59-61, as well as the testimony of Apple's Avie Tevanian that the patent cross-license, Microsoft's $150 million investment and the technology agreement were really one "overall agreement," 11/4/98 pm Tr. at 54-55; *see also* Tevanian ¶¶ 28-43; GX 583; GX 584; GX 1167. For another, the technology agreement does *not* require Apple to exclude Navigator from the default installation of the Mac OS, but rather expressly provides that "Apple may bundle browsers other than Internet Explorer with . . . Mac OS system software releases." GX 1167 at 44. Apple was free under the agreement to include Navigator "inside a folder" on the Mac OS desktop like the OLS folder on the Windows desktop, Tevanian ¶ 38, and Apple continued to bundle Navigator with the Mac OS after the agreement was executed, Tevanian ¶ 24; 11/4/98 pm Tr. at 56-57.

C. Plaintiffs Have Not Shown the Requisite Causal Link between Microsoft's Conduct and Its Position in Operating Systems.

Plaintiffs concede that they were required to show that the challenged conduct had the "requisite impact" on the alleged market for Intel-compatible PC operating systems to make out a monopoly maintenance claim. *See* Pls. Br. at 82-83. They have not done so. The district court expressly found that "[t]here is insufficient evidence to find that, absent Microsoft's actions, Navigator and Java already would have ignited genuine competition in the market for Intel-compatible PC operating systems." 84 F. Supp. 2d at 112 (FF 411). Plaintiffs are silent on this finding, which is fatal to their claim.

Plaintiffs' monopoly maintenance claim is unusual in that they do not claim that Microsoft's conduct adversely affected "existing competitors" in the so-called "operating system market." Pls. Br. at 83. As plaintiffs acknowledge, "That was not Microsoft's goal." *Id.* They instead contend that Microsoft improperly maintained a monopoly in operating systems by foreclosing distribution of Navigator and Java, which are not part of the product market defined by the district court. In fact, plaintiffs themselves assert that "[s]uch middleware is . . . a complement to, rather than a substitute for, an operating system." *Id*. at 54. Plaintiffs failed to prove that Microsoft's allegedly unlawful conduct directed at these "complements" contributed significantly to the maintenance of Microsoft's purported operating system monopoly. *See* MS Br. at 115-18. That failure of proof is particularly acute if Microsoft's inclusion of IE in Windows was lawful, as plaintiffs now concede. Pls. Br. at 66, 104 (challenging only Microsoft's refusal to permit OEMs to remove "user access" to some IE functionality).

Plaintiffs seek to derive evidence of causation from a May 1995 Microsoft document stating that Netscape's strategy is "to commoditize the underlying operating system" by moving "the key APIs" into Navigator. *Id*. at 13, 85 (citing GX 20 at 112876.3). That document does not predict, however, that such a strategy by Netscape, even if successfully executed, would spur entry into the alleged market for "Intel-compatible PC operating systems" (as opposed to depriving those operating systems of their principal value as platforms for applications). *See* 1/13/99 Tr. at 503. Plaintiffs presented no testimony from other operating system vendors that Navigator had the potential to create greater competition among operating systems. Nor did plaintiffs ever explain why any rational company would invest the resources required to develop a new PC operating system in order to participate in a "commodity" business. As Microsoft's economist, Richard Schmalensee, explained, there is normally "less entry" in a "commodity" business "because there is less to be won from entry into such a business." 6/21/99 am Tr. at 55.

In responding to Microsoft's description of the speculative chain of causation on which their monopoly maintenance claim is premised, MS Br. at 117, plaintiffs cast further doubt on whether Microsoft did anything to "hobble" middleware threats to Windows. *See* Pls. Br. at 85-87. Plaintiffs seek to dismiss as "immaterial" Barksdale's concession that Netscape never saw Navigator as a complete substitute for Windows. *Id.* at 86. But Barksdale went much farther than that, declaring that Netscape "never maintained in any serious way" that Navigator was a substitute even for the "platform characteristics of Windows." 10/20/98 pm Tr. at 73. Navigator thus falls out of the equation as anything other than a distribution vehicle for Java. *But see* Muglia ¶ 82 (JVM included in Navigator for Windows did not support JNI until early 1998).

With regard to Java, plaintiffs argue that if ISVs wrote hybrid applications that call on APIs exposed by the Java class libraries as well as APIs exposed by Windows, it might be less costly to port those applications to other operating systems. Pls. Br. at 86. Even if that were true, there is no evidence—much less a finding by the district court—that Microsoft prevented ISVs from writing such hybrid Java applications. In fact, by creating a well-regarded Java implementation for Windows and distributing a high performance JVM with every copy of Windows, Schmalensee ¶ 148; DX 53 at 2, Microsoft actually increased the stock of applications that rely in whole or in part "on APIs exposed by the Java class libraries," 84 F. Supp. 2d at 29 (FF 74). On plaintiffs' view that such hybrid Java applications are easier to port to other operating systems than applications written in programming languages such as C++ that rely exclusively on Windows APIs, Pls. Br. at 86, Microsoft's actions actually *lowered* the so-called applications barrier to entry, which runs directly counter to plaintiffs' causation argument.

Although plaintiffs assert that "new firms would have greater incentives to enter the market" for Intel-compatible PC operating systems if more applications were written to cross-platform middleware like Java, *id*. at 86-87, they provide no support for that supposition. In short, plaintiffs' theory of causation remains in the realm of speculation, with no findings by the district court to support it. Plaintiffs insist that Navigator and Java were not competitors in the PC operating system market, and they have not shown that Navigator or Java would have created *any* additional competition in that putative market.

III.

The District Court's Attempted Monopolization Ruling Should Be Reversed.

Plaintiffs defend the district court's attempted monopolization ruling on two grounds. First, plaintiffs argue that Microsoft's alleged proposal to Netscape in June 1995 to "divide up the market" alone constituted attempted monopolization. Pls. Br. at 87. Second, they contend that the "anticompetitive acts engaged in by Microsoft . . . after Netscape refused that offer [*i.e.*, the very same acts that underlie plaintiffs' monopoly maintenance claim] also constituted attempted monopolization of the Web browser market." *Id*. Plaintiffs are wrong on both counts.

A. Microsoft's June 1995 Discussions with Netscape Did Not Constitute Attempted Monopolization.

Plaintiff's contention that Microsoft's June 1995 discussions with Netscape constituted attempted monopolization is based entirely on *American Airlines*, a decision the Fifth Circuit carefully limited to its unique facts. 743 F.2d at 1119 ("We see [the] alleged conduct as uniquely unequivocal and its potential, given the alleged market conditions, as being uniquely consequential."). Indeed, *American Airlines* is the only case in which a court has found that making a proposal that is then rejected by the other party can satisfy the anticompetitive conduct, specific intent and dangerous probability elements of attempted monopolization. *See* Pls. Br. at 88-93.

Even accepting plaintiffs' version of events, Microsoft's efforts in June 1995 to persuade Netscape to utilize Internet-related functionality in Windows 95 are a far cry from the brazen price-fixing proposal ("Raise your goddamn fares twenty percent. I'll raise mine the next morning.") in *American Airlines*. *See* MS Br. at 122-23. To proscribe the sorts of discussions Microsoft had with Netscape would cast a shadow on the legality of a wide range of necessary and important discussions between companies that develop complementary products.

The discussions between Microsoft and Netscape were not "uniquely unequivocal," and they did not relate to control of price, the hallmark of monopoly power. Although plaintiffs assert that Microsoft proposed to "divide up the market," Pls. Br. at 87, that simplistic assertion cannot be squared with the district court's findings, *see* 84 F. Supp. 2d at 31-32 (FF 83-86). In addition, plaintiffs' description of Microsoft's alleged proposal has been a moving target. Netscape's Barksdale originally testified that Microsoft "offered to allow us to continue to develop browsers for other operating systems, as long as we did not try to compete with them in developing *a browser* for the Windows 95 platform." Barksdale ¶ 110 (emphasis added). Plaintiffs now assert, however, that Microsoft "proposed that Netscape leave *platform-level browsing technology* for Windows 95 to Microsoft, in exchange for Microsoft's leaving the browser business for other operating systems to Netscape." Pls. Br. at 63 (emphasis added). And the documents on which plaintiffs rely (*id.* at 13, 93) describe a completely different proposal. GX 22 at 167106 ("[T]he concept is that for 24 months they agree to do certain things in the client and we agree to help make their server business successful."); GX 540 at 10340 ("They may be willing to give us a client advantage, if we give them the server advantage.").

Nor can it be said that the potential impact of the June 1995 discussions was "uniquely consequential." The Fifth Circuit stressed in *American Airlines* that the participants in the discussion were the CEOs of the two airlines, which "jointly had a high market share [76%] in a market with high barriers to entry [FAA limitations on the number of arrivals at the Dallas-Fort Worth airport]." 743 F.2d at 1118. Here, by contrast, the Microsoft participants in the discussions with Netscape were not senior executives. Rosen ¶¶ 68-75. More importantly, the alleged market—Web browsing software—was a nascent business with many different competitors, including major companies like Apple, IBM and Sun. *See* Chase ¶¶ 13, 15. At the time, Microsoft had a zero share of the putative market, and the district court did not find that there are "high barriers to entry" into the "Web browser" market. (Netscape was incorporated in April 1994 and shipped its first commercial product in December 1994. Allchin ¶205; DX 68 at 69214.) Thus, unlike *American Airlines*, "at the moment of acceptance," Microsoft would not have "acquired monopoly power" over a relevant product market, *i.e.*, the power to control prices or exclude competition. 743 F.2d at 1118.

Plaintiffs also ignore Barksdale's admission that Microsoft "didn't ask us to stop that moment from building our product, since we already announced it and had it in beta." 10/27/98 pm Tr. at 70. On cross-examination, Barksdale retreated from his earlier assertion that Microsoft insisted that Netscape "not develop our own browser for Windows 95," Barksdale ¶110, contending instead that Microsoft proposed that Netscape "gradually move back out of the Windows 95 business" over "the next year or two," 10/27/98 pm Tr. at 70. In fact, Barksdale admitted that Microsoft was eager for Netscape to release a version of Navigator for Windows 95:

> [T]hey wouldn't have asked us to get out of it immediately. We were going to release product in about a month. It was going to be great for Windows 95. It was going to help them sell a lot more because the Navigator was a hot application that ran on top of Windows 95. It was the killer app of 1995 . . . . They liked it because it helps sell operating systems.

10/27/98 pm Tr. at 71. This testimony shows that that the June 1995 discussions were neither "uniquely unequivocal" nor "uniquely consequential."

Lastly, Microsoft's request that Netscape utilize Microsoft's Internet-related platform technologies in subsequent versions of Navigator for Windows 95 would have had no immediate consequence. Most of the Internet-related APIs that Microsoft wanted Netscape to utilize did not ultimately become available until the August 1996 release of IE 3. *See* MS Br. at 31. As a result, even if Netscape had accepted on the spot Microsoft's suggestion that it utilize some or all of those APIs, any effect on competition would have been more than a year into the future. Of course, one can only speculate about whether competition actually would have been affected and, if so, what that effect might have been.

B. Microsoft's Competition with Netscape Following the June 1995 Discussions Did Not Constitute Attempted Monopolization.

Plaintiffs contend that Microsoft's "post-June 1995" conduct also constituted an attempt to monopolize the "Web browser" market. Pls. Br. at 43. Because it is based on the same alleged conduct as their monopoly maintenance claim, *see id.* at 93-94, plaintiffs' "post-June 1995" attempted monopolization claim fails for the same reason: the conduct was not exclusionary. In addition, plaintiffs have not shown that Microsoft acted with a "specific intent" to obtain monopoly power in Web browsing software or that there was a dangerous probability that Microsoft would achieve such power. Both of these failures are likewise fatal to plaintiffs' "post-June 1995" attempted monopolization claim.

1. Microsoft's Desire To Keep Navigator from Becoming the "Standard" Web Browsing Software Is Not a Specific Intent To Monopolize.

"[S]pecific intent in this context refers to a purpose to acquire monopoly power by driving one's rival from the market by exclusionary or predatory means." *Ass'n for Intercollegiate Athletics for Women* v. *NCAA*, 735 F.2d 577, 585 (D.C. Cir. 1984). Plaintiffs have never argued that Microsoft intended to drive Netscape from the market. Under their theory of the case, Microsoft's goal was much more modest: to prevent Navigator from becoming the "standard" Web browsing software so that ISVs "would continue to focus their efforts on the Windows platform." Pls. Br. at 14; *see also* 84 F. Supp. 2d at 43 (FF 133); GX 710 at 203013. As plaintiffs explained in their proposed findings of fact:

> Preventing the browser threat from materializing . . . did not require Microsoft to eliminate other browsers entirely—or even to monopolize the browser market. Rather, Microsoft needed only to prevent any one browser rival from obtaining a large market share.

Pls. Joint Proposed Findings of Fact ¶ 359.3; *see also* GX 1372 at 111. Seeking to prevent a rival from obtaining a large market share is not a specific intent to acquire monopoly power.

Plaintiffs point out that the district court "expressly found that Microsoft 'set out to maximize Internet Explorer's share of browser usage at Navigator's expense.'" Pls. Br. at 94 (quoting 84 F. Supp. 2d at 43 (FF 133)). Of course, every competitor seeks to win market share from its rivals—that is competition. Plaintiffs cite no case in which a court held that the goal of winning as much business as possible at the expense of a rival satisfies the specific intent element of attempted monopolization. To the contrary, the intent to "expand one's market share is presumptively lawful." *MCI* v. *AT&T*, 708 F.2d 1081, 1113 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). Courts thus have held that "[m]ore than an intent to win every sale, even if that would result in the demise of a competitor, is required before it can be concluded a defendant has the type of exclusionary intent condemned by the antitrust law." *Transamerica*, 481 F. Supp. at 1010; *accord Great Escape, Inc.* v. *Union City Body Co.*, 791 F.2d 532, 541 (7th Cir. 1986) ("[M]ere intention to exclude competition and to expand one's business is not sufficient to show a specific intent to monopolize."). Indeed, if an intent to maximize market share at the expense of a rival were sufficient, all competitive companies would harbor an illicit intent to monopolize.

2. Plaintiffs Have Not Shown a Dangerous Probability of Monopolization.

Plaintiffs argue that the rapid increase in IE's usage share from an insignificant share in 1995 and 1996 to over 50% compels a finding of dangerous probability of monopolization. Pls. Br. at 95 (citing *Multistate Legal Studies, Inc.* v. *Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1554-55 (10th Cir. 1995)). Leaving aside the district court's failure to perform the analysis required to define a legally cognizable "market" for Web browsing software—which alone is fatal to plaintiffs' attempted monopolization claim—plaintiffs have not shown the dangerous probability required by Section 2.

The fact that IE's usage share increased rapidly between 1996 and 1998 does not establish a dangerous probability of monopolization. As Areeda explains:

> [I]f the defendant can experience rapid growth in market share, others can as well. Market shares that go from 0 to 60 percent in two years . . . suggest an unstable market in which it is unlikely that any firm could maintain a monopoly output reduction for very long. *In such cases especially close attention should be paid to entry barriers*, for it would seem that any new entrant could quickly undermine a monopolist's position.

IIIA AREEDA, *supra* ¶ 807e2, at 359-60 (emphasis added) (footnote omitted). The district court did not find that there are any barriers to entry into the "Web browser" market. Nor did it find that Netscape—now owned by AOL Time Warner—is even close to being driven from the putative market; to the contrary, usage of Navigator is growing. 84 F. Supp. 2d at 103 (FF 378). In the absence of such findings, the attempted monopolization ruling cannot stand. *See Dial A Car, Inc.* v. *Transp., Inc.*, 82 F.3d 484, 487 n.2 (D.C. Cir. 1996) ("[N]o facts have been alleged to indicate that any company . . . is even close to being driven from the . . . market."); *id.* at 488 ("Equally important, appellant's complaint does not allege any barriers that would prevent entry into the market by any number of additional providers.").

Faced with AOL's announcement that it intends to replace IE with Navigator in AOL's proprietary client software—which would reduce IE's usage share to between 24% and 32%—plaintiffs argue that AOL's purchase of Netscape is irrelevant because dangerous probability of monopolization is determined "as of the time of the conduct." Pls. Br. at 96. Between 1995 and 1998—the time of the challenged conduct—IE's usage share rose from 0% to approximately 45%. *See* 84 F. Supp. 2d at 98-99, 100 (FF 360, 364). Under the very case law cited by plaintiffs, Pls. Br. at 95, such a usage share—even if it reflected control over productive capacity, which it does not—is insufficient to establish a dangerous probability of monopolization, *see M & M Med. Supplies & Serv., Inc.* v. *Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 168 (4th Cir. 1992) ("claims involving between 30% and 50% shares should usually be rejected"); *see also* MS Br. at 123-24. Plaintiffs thus lose either way: either dangerous probability is determined at the time of trial, in which case AOL's purchase of Netscape defeats such a probability, or it is determined at the time of the conduct, in which case IE's usage share was insufficient to establish a dangerous probability of monopolization.

IV.

The Relief Awarded by the District Court Cannot Stand.

It is now apparent from the district judge's public comments that the relief awarded in this case was not a carefully tailored response to the antitrust violations found, but rather an attempt to punish Microsoft for what the district judge termed "'arrogance which derives from power and unalloyed success.'" AULETTA, *supra* at 397. In February 2000, the district judge reportedly told Ken Auletta that "he saw a structural remedy as too draconian and too risky" and "feared that the courts would not be able to divide Microsoft without damaging the company, and perhaps the economy." Ken Auletta, *Final Offer*, NEW YORKER, Jan. 15, 2001, at 43. But those well-founded concerns were discarded when, based on extrajudicial sources of information, the district judge became angry that Microsoft's senior officers "'to this day . . . continue to deny that they did anything wrong.'" AULETTA, *supra* at 371. It is not an appropriate exercise of judicial power to break up Microsoft because it maintains that its conduct was lawful. Nor is the breakup justified because the district judge believes Microsoft's chairman has "'a Napoleonic concept of himself and his company,'" *id.* at 397, or becomes convinced, based on viewing a 25-year-old photograph of Microsoft's founders (not in the record), that Bill Gates is "'a smart-mouthed young kid'" who "'needs a little discipline,'" *id.* at 168-69.

Plaintiffs insist that the entire decree should be affirmed even if this Court concludes that part of the district court's liability determination is incorrect, Pls. Br. at 128, but their argument is flawed. The absence of any factual findings or legal reasoning on the subject of relief renders it impossible for this Court to determine which provisions of the decree were intended to redress which antitrust violations. In *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 459-60 (1993), the Supreme Court reversed a judgment because "the jury's verdict did not negate the possibility that the § 2 verdict rested on the [legally inadequate] attempt to monopolize ground alone." The same result is required here.

A. Microsoft Was Entitled to an Evidentiary Hearing.

Although it was plaintiffs who urged the district court to enter sweeping relief without conducting an evidentiary hearing, *see* Pls. Reply Mem. in Supp. of Proposed Final J. at 69, they now seek to blame Microsoft for that deprivation of basic due process, Pls. Br. at 135. As the Supreme Court has held, however, "our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted to both sides of a dispute." *Granny Goose Foods, Inc.* v. *Bhd. of Teamsters, Local No. 70*, 415 U.S. 423, 439 (1974). Microsoft was denied that opportunity.

The case on which plaintiffs base their argument that the district court was free to deny Microsoft an evidentiary hearing is clearly inapposite. *See* Pls. Br. at 135. In *Davoll* v. *Webb*, 194 F.3d 1116, 1142 (10th Cir. 1999), the defendant *waived* its right to an evidentiary hearing by agreeing "that the equitable relief issues would be addressed on the basis of the parties' written submissions." Microsoft agreed to no such thing.

To be sure, an injunction may be entered without an evidentiary hearing if there are no disputed issues of fact regarding the moving party's entitlement to such relief or its form, *see Am. Can Co.* v. *Mansukhani*, 814 F.2d 421, 425 (7th Cir. 1987), but that is decidedly not the case here. As plaintiffs' submission of six declarations and more than 50 new exhibits demonstrated, their proposal for relief raised a variety of complex factual issues relating to products such as Windows 2000 Server and Windows CE that are outside the markets defined by the district court and were barely mentioned at trial. This case thus bears no resemblance to *Eli Lilly & Co.* v. *Generix Drug Sales, Inc.*, 460 F.2d 1096, 1107 (5th Cir. 1972), in which the district court was excused from holding an evidentiary hearing before entering injunctive relief because "no material fact issues remain and there is indeed nothing left to be tried." Similarly, in *Socialist Workers Party* v. *Illinois State Board of Elections*, 566 F.2d 586, 587 (7th Cir. 1977), *aff'd*, 440 U.S. 173 (1979), the court concluded that "[t]here was no factual dispute as to the ground on which the injunction was ordered" and that nothing in an offer of proof submitted by the defendant "would have altered the result." Although plaintiffs attempt to dismiss Microsoft's offers of proof as "redundant" of arguments contained in Microsoft's written submissions, Pls. Br. at 143-44, they do not contend that admission of such evidence—which demonstrates that the decree is fundamentally misconceived and impossible to implement without inflicting grievous harm on Microsoft and numerous third parties—could have had no impact on the relief awarded by a fair and impartial adjudicator.

Plaintiffs' effort to find justification in Supreme Court decisions for lesser due process protections for defendants in antitrust cases fares no better. *See* Pls. Br. at 135-36. Justice Frankfurter's dissent in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 180-81 (1948), notes that the decree at issue there was the product of "a painstaking process of adjudication" and was formulated "after due absorption of all the light that could be shed upon remedies appropriate for the future." Here, the district judge expressly stated his desire to "conclude the remedy phase on a fast track," 4/4/00 Tr. at 4, because his "transcende[nt] objective [was] to get this thing before an appellate tribunal—one or another—as quickly as possible because I don't want to disrupt the economy or waste any more of yours or my time on a remedy if it's going to come back here," *id.* at 13. (The district judge initially wanted appellate review to precede consideration of relief, but the parties advised him that the Expediting Act prohibited that. *Id.* at 11-13.) Plaintiffs emphasize (Pls. Br. at 140-41) the district court's "desideratum" to get the remedy issue "resolved within sixty days," 4/4/00 Tr. at 19, but such an interest in moving at breakneck speed does not justify short-circuiting judicial procedures to Microsoft's serious detriment. Furthermore, the Court in *Paramount Pictures* reversed and remanded because the district court's findings of fact in support of the decree were in some instances non-existent, 334 U.S. at 152, and in other instances "deficient" or "obscure," *id.* at 172. Here, the district court made *no* factual findings in support of the remedy, making effective appellate review impossible.

Although they argue that "Microsoft obviously cannot rely on post-trial developments," Pls. Br. at 96, plaintiffs assert that it was permissible for the district court to rely on hearsay declarations and documents never admitted into evidence in imposing draconian relief on Microsoft, *see id.* at 142-43. Their arguments on this score are without substance.

First, citing the admission over the government's hearsay objection of a study showing the adverse tax consequences of the proposed decree in *United States* v. *E.I. du Pont de Nemours & Co.*, 177 F. Supp. 1, 19-20 (N.D. Ill. 1959), *vacated*, 366 U.S. 316 (1961), plaintiffs assert that "hearsay rules apply loosely, if at all, to the district court's post-trial proceedings on remedy," Pls. Br. at 142. That assertion is based on the false premise that the district court's decision as to remedy was not part of the trial, which leads plaintiffs to the erroneous conclusion that the district court was free to employ procedures in the remedy phase that would not have passed muster even in a preliminary injunction hearing. As the Third Circuit stated in *Sims* v. *Greene*, 161 F.2d 87, 88 (3d Cir. 1947), issuance of a preliminary injunction on a paper record in the face of disputed factual issues "is contrary not only to the Rules of Civil Procedure but also to the spirit which imbues our judicial tribunals prohibiting decision without a hearing." Awarding permanent injunctive relief, particularly relief that inflicts enormous harm on Microsoft and its employees, shareholders, customers and business partners, on such a record is indefensible.

Second, plaintiffs assert that because Rule 703 of the Federal Rules of Evidence permits an expert to base an opinion on facts "of a type reasonably relied upon by experts in the particular field in forming opinions," even if all of those facts are not admissible in evidence, the district court properly relied on hearsay declarations from plaintiffs' six experts in deciding the issue of remedies. Pls. Br. at 143. That is a complete non sequitur. Having never been subjected to cross-examination, the hearsay declarations are entitled to no weight. *See, e.g.*, *Scott* v. *Davis*, 404 F.2d 1373, 1375 (5th Cir. 1968). And without those declarations and their supporting exhibits, there was *no* evidentiary basis for the district court to award the relief it did—as demonstrated by plaintiffs' liberal citation to the declarations and exhibits (labeled "RX") in its brief to this Court. *See* Pls. Br. at 97, 121, 122, 123, 124, 125, 127, 132, 134, 135.

Plaintiffs argue at length that Microsoft was not "surprised" by the district court's decision to award extreme relief without an evidentiary hearing, *see id*. at 137-40, but that is both wrong and beside the point. A denial of due process is no less egregious because the party adversely affected had reason to suspect its fundamental rights might be trampled. Plaintiffs' reliance on *United States* v. *Ward Baking Co.*, 376 U.S. 327 (1964), is misplaced. In that case, the district court entered a consent decree proposed by the defendant before obtaining the government's views, and the Supreme Court remanded the case to enable the government to "produce evidence at trial warranting" the additional relief it sought. *Id.* at 333 n.4. The only lesson to be drawn from *Ward Baking* is that the parties are entitled (indeed, required) to make an evidentiary record regarding relief in an antitrust case—an opportunity that was denied here.

Plaintiffs' assertion that Microsoft was on notice that plaintiffs would seek extreme relief such as a breakup before Microsoft received their proposal for relief is wrong in any event. Plaintiffs point to standard boilerplate in the complaints about other "necessary and appropriate" relief, Pls. Br. at 137, but they do not deny that they "sought specific injunctive relief," *id.* at 4, as opposed to making tentative suggestions about possible remedies as in *United States* v. *American Tobacco Co.*, 221 U.S. 106, 150 (1911). The remedies plaintiffs requested in their complaints did not include breakup or any of the other extreme relief ultimately awarded. The variety of relief proposals bandied about in the press (*see* Pls. Br. at 138-39) did not give Microsoft notice in a legally cognizable form of the precise relief plaintiffs were seeking. As the Supreme Court has held, the fundamental right to notice "must be granted at a meaningful time and in a meaningful manner." *Fuentes* v. *Shevin*, 407 U.S. 67, 80 (1972) (internal quotation omitted).

Plaintiffs contend that Microsoft knew the hearing scheduled for May 24, 2000 was to be the last one—as opposed to the first one—on the subject of remedies, Pls. Br. at 140-41, but that contention is belied by the record. At the April 4, 2000 status conference, Microsoft's counsel made it "absolutely clear" to the district court that Microsoft could not take any position on what procedures were appropriate on the issue of remedies until it knew "what the government's demand is." 4/4/00 Tr. at 16. Microsoft suggested that "the first steps ought to be a demand and a response to the demand. And then we can talk about the procedure." *Id.* at 18. The district court responded, "I think [that] is reasonable. I think you're entitled to know where they are coming from in terms of what they are going to ask me to do." *Id.* The district court then entered Scheduling Order No. 8, establishing precisely the schedule Microsoft had suggested. Plaintiffs were to submit their proposal for relief on April 28, 2000, and twelve days later, Microsoft was to submit its "summary response" to that proposal, including its own proposal for relief *and* suggestions as to further procedures. *See* 4/5/00 Tr. at 5-8. Issues of procedure were to be resolved later, presumably at the May 24, 2000 hearing.

Plaintiffs do not—and cannot—claim that Microsoft failed to comply with any aspect of Scheduling Order No. 8, which provided neither for reopening discovery nor for Microsoft's submission of evidence in opposition to plaintiffs' proposed decree. It is thus disingenuous for plaintiffs to claim that Microsoft "chose not to take advantage" of an opportunity to oppose their proposal for relief, Pls. Br. at 141, or made a "deliberate decision not to do so," *id.* at 144. Neither the district court's remarks at the April 4 and 5, 2000 status conferences nor the terms of Scheduling Order No. 8 gave Microsoft any reason to believe that the May 24, 2000 hearing would be the end rather than the beginning of the remedies process. Out of an abundance of caution, Microsoft prepared an offer of proof in advance of that hearing only because plaintiffs had requested in their May 17, 2000 reply that the district court enter their proposed decree without further proceedings. Pls. Reply Mem. in Supp. of Proposed Final J. at 68-70.

The record shows that Microsoft was denied due process not because it "made a calculated decision not to take remedy seriously," Pls. Br. at 144, but because the district judge decided that Microsoft had no right to due process. As the district judge told the *New York Times*, "I am not aware of any case authority that says I have to give them any due process at all. The case is over. They lost." Joel Brinkley & Steve Lohr, *Retracing the Missteps in the Microsoft Defense*, N.Y. TIMES, June 9, 2000, at C8.

B. The Breakup of Microsoft Is Legally Indefensible.

Plaintiffs do not—and cannot—point to a single case since the Sherman Act was enacted in 1890 in which a court forcibly broke up a unitary company like Microsoft that is *not* the product of mergers with its competitors. Thus, while breakup may have "traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control," *du Pont*, 366 U.S. at 329, cases dissolving trusts and unwinding acquisitions (*see* Pls. Br. at 119-20) are inapposite in a Section 2 case predicated on internal expansion and unilateral action. Moreover, plaintiffs' assertion (*see id.* at 123)—based entirely on hearsay—that Microsoft is not really a unitary company is simply wrong. MS Offer of Proof 11-13, 20-26.

Standard Oil was a trust that could be dissolved through transfers of stock, and AT&T agreed to be divided along the lines of existing operating companies. Even so, the AT&T breakup was anything but simple, as this Court well knows. That leaves *United Shoe*, a case plaintiffs describe in a highly misleading fashion. Pls. Br. at 123. In 1953, Judge Wyzanski rejected the government's request to break United Shoe into three companies based in part on factors referred to in the language plaintiffs quote. *See* 110 F. Supp. 295, 348 (D. Mass. 1953). Contrary to plaintiffs' assertion that the Supreme Court "reversed the district court's order denying the government's request that the company be broken up," Pls. Br. at 123, that order was *affirmed*, 347 U.S. 521 (1954). The Supreme Court decision cited by plaintiffs was handed down *15 years later*, after the government filed a petition to modify the decree on the ground that the original relief had been ineffective. Judge Wyzanski denied that petition based on his belief that he did not have the power to modify the decree. *See* 266 F. Supp. 328, 330, 334 (D. Mass. 1967). On appeal, the Supreme Court held that Judge Wyzanski had misapprehended the scope of his authority to modify the decree. The case then was remanded for Judge Wyzanski "to determine whether the relief in this case has met the standards which this Court has prescribed." 391 U.S. 244, 252 (1968). Thereafter, the decree was modified with the *consent* of the parties.

The *United Shoe* case is hardly a blueprint for action here in any event. After the government finally succeeded in breaking up United Shoe, "[t]he company then went into rapid decline; the price of shoe machinery went up; America lost its leadership in shoe machinery; and today the plant stands boarded and idle in Belmont, Massachusetts . . . ." Lino A. Graglia, *Is Antitrust Obsolete?*, 23 HARV. J.L. PUB. POL'Y 11, 17 (1999). That same fate should not befall the American software industry. Although plaintiffs' experts predict that the breakup will have a "major influence" on the "information technology sector of the economy," Shapiro Decl. at 29, the district court admitted that nobody knows what "may or may not ensue" from the breakup, *United States* v. *Microsoft Corp.*, 97 F. Supp. 2d 59, 62 (D.D.C. 2000). The risk that the district court got it wrong based on plaintiffs' glib assurances that the breakup would be "simple" and "sure" (Pls. Br. at 119) is too great a risk to take.

1. Plaintiffs Have Conceded Away the Basis for a Breakup.

Plaintiffs do not contend that the breakup is justified by a causal connection between the conduct found anticompetitive and Microsoft's position in operating systems. That alone is fatal to the breakup. *See* MS Br. at 129-30. Plaintiffs further concede that the breakup "does not affect Microsoft's position in any market." Pls. Br. at 124. In fact, they do not even contend that the breakup will end the conduct the district judge found unlawful or prevent its recurrence, which they say is the standard for awarding relief in antitrust cases. *Id.* at 119. Plaintiffs defend the breakup based on their assertion that it would alter "OpsCo's" incentives to behave in ways plaintiffs find objectionable. *Id.* at 124. Even that assertion is wrong.

Just as Microsoft does now, "OpsCo" would have powerful incentives to add new functionality to Windows to (i) keep the platform appealing to ISVs, OEMs and users and (ii) keep Windows competitive with other platforms. That incentive would extend to incorporating functionality into Windows that other software vendors supply as applications or middleware. Presumably, if "OpsCo" maintained Windows as an attractive platform by keeping pace with developments in hardware and software technology and with changing consumer demand, ISVs would continue writing applications for Windows. Plaintiffs nowhere explain how the breakup would reduce the "applications barrier to entry." *See id.*

"OpsCo" would behave in precisely the same way Microsoft behaves today because such behavior makes perfect business sense. Although plaintiffs persuaded the district court to label it "anticompetitive," the process of (i) adding new functionality to a platform, (ii) distributing the functionality as broadly as possible, and (iii) encouraging ISVs to take advantage of the functionality in their products is what all successful platform vendors do—even if the functionality in question was first marketed as a separate product. Condemning such routine and beneficial practices as predatory is dangerously misguided.

2. The Breakup Is Not Narrowly Tailored To Redress the Conduct Found To Be Anticompetitive.

Plaintiffs twist the principle that relief awarded in a Section 2 case may "go beyond the narrow limits of the proven violation," *United States* v. *U.S. Gypsum Co.*, 340 U.S. 76, 90 (1950), beyond all recognition in arguing that the district court could order a breakup even if much narrower relief would suffice to redress the violations found, *see* Pls. Br. at 125. Six years ago, the DOJ was singing a very different tune when it encouraged this Court to reject a breakup proposal advanced by anonymous amici participating in the Tunney Act review of Microsoft's July 1994 consent decree.

- Then, the DOJ chided the anonymous amici for "ignor[ing] the fundamental remedial principle that the remedy be tailored *to the violation*." Reply Br. for Appellant U.S. at 2 (emphasis in original).
- Then, the DOJ argued that the principle that antitrust remedies "'must effectively pry open to competition a market that has been closed by defendants' illegal restraints,'" *Int'l Salt Co.* v. *United States*, 332 U.S. 392, 401 (1947), "does not mandate the use of wide-ranging remedies that are unrelated to, and out of proportion with, the challenged practices." Reply Br. for Appellant U.S. at 11.
- Then, the DOJ embraced the court's observation in *United States* v. *National City Lines, Inc.*, 134 F. Supp. 350, 355 (N.D. Ill. 1955), that "a finding of an offense under the antitrust laws does not invest a court with a license to embark on a general program of comprehensive control of the defendants' business." Reply Br. for Appellant U.S. at 16.

The law of remedies in antitrust cases has not changed in the interim.

Contrary to plaintiffs' unsupported assertion, there is no finding by the district court "that Microsoft used its dual control of the operating system and applications business anticompetitively." Pls. Br. at 125. Nor is there any finding that Microsoft "acquired" either its operating systems or its applications; they are aspects of an integrated business Microsoft has built from the ground up over the last 25 years. Cases such as *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110 (1948), are thus inapposite. The competitive advantages Microsoft derives from its broad-based activities, including its ability to develop complementary products, are entirely legitimate and provide no justification for a breakup. As the Second Circuit held in *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), "These are gains that accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power."

3. The Breakup Is Unjustified Given the Vagaries of the Legal Rules Applied to Microsoft's Conduct.

Plaintiffs do not contest the basic principle that uncertainty as to the law governing a defendant's conduct under Section 2 counsels in favor of narrower relief. Instead, they argue that the conduct on which they based their monopoly maintenance claim—other than the centerpiece of their case, the alleged tying of IE to Windows—"violated well-established antitrust principles." Pls. Br. at 127. That argument is unavailing.

Other than the tying claim, the only conduct found by the district court independently to violate Section 2 was Microsoft's agreements with IAPs, 87 F. Supp. 2d at 41-42, the very agreements the district court held did *not* violate Section 1 because they did not substantially foreclose Netscape's distribution of Web browsing software, *id.* at 53. The other conduct challenged by plaintiffs, while not anticompetitive in and of itself, served only to reinforce the district court's view that Microsoft had engaged in "predacious" conduct. *Id.* at 44. Even if such an amorphous approach to labeling conduct "anticompetitive" were justified, it would be rash to break up Microsoft for engaging in conduct whose purportedly adverse effect on competition "rests on criteria not previously made clear." III AREEDA, *supra* ¶ 653b4, at 94.

4. The Breakup Would Impair Important Public Benefits.

In seeking to dismiss the serious harm to Microsoft and third parties that would result from the breakup, plaintiffs rely solely on hearsay declarations of "experts who agreed that the benefits to society created by the remedy would far outweigh the costs." Pls. Br. at 127. That reliance is misplaced.

None of the plaintiffs' experts is an expert in the software business, and none knows anything about the internal structure of Microsoft other than what he or she has read in books. For example, in a three-page declaration, Ernest von Simson offered his "personal view," without any empirical basis, that a "structural separation" of Microsoft "would not cause significant inconvenience to large enterprises." von Simson Decl. at 1-2. Such musings are entitled to no weight, especially when they are contradicted by statements from leaders of major corporations like GEICO and Nordstrom. *See* MS Supp. Offer of Proof at 11-13, 15-17.

More importantly, plaintiffs are wrong about what their own experts said. Not one of the six experts was able to opine that the breakup of Microsoft would result in an immediate (or, indeed, eventual) increase in competition in the market for "Intel-compatible PC operating systems." And their contention that the benefits of the breakup would outweigh its costs was uninformed speculation. *See, e.g.*, Shapiro Decl. at 14-16. For example, the prediction that the "close communication between operating system developers and applications developers" at Microsoft that "is critical to the success of each" can still occur across artificial corporate boundaries (*see* Romer Decl. ¶ 65) is entitled to no weight when it flies in the face of statements from knowledgeable people to the contrary. *See* MS Offer of Proof at 11-13, 20-26, 28-30.

The district court should not, under the guise of awarding relief for specific antitrust violations, have engaged in economic experimentation based on the untested views of academics who believe they know better than the Nation's free enterprise system how the software industry should be structured.

5. The District Court Ignored Severe Implementation Problems Inherent in the Breakup.

Plaintiffs distort the nature of Microsoft's objection to the breakup when they assert that "Microsoft questions some details of the divestiture." Pls. Br. at 128. The problems with the breakup cannot be resolved through careful drafting of a plan of divestiture, because the entire notion of breaking up Microsoft is wrongheaded. Thus, any effort to implement the breakup would be fraught with problems, inflicting serious harm on Microsoft and numerous third parties. Two of the world's leading investment banks, Goldman Sachs and Morgan Stanley, were prepared to explain why the proposed breakup would be impossible to implement without causing severe economic dislocation, MS Offer of Proof at 16-19, but the district court refused even to consider what they had to say.

6. The Breakup Is Punitive in Concept and Effect.

Plaintiffs are understandably silent on the punitive nature of the breakup given the district judge's public comments. Those comments show that the district judge intended the breakup to punish Microsoft for its continued insistence that it had not violated the law, AULETTA, *supra* at 369-71, and for what the district judge called a "'very sophomoric, arrogant reaction'" to his December 11, 1997 preliminary injunction, *id.* at 14. Indeed, the latter led the district judge to conclude before this case was filed that "Microsoft was disdainful" and "proud to operate outside business norms." *Id.*

Plaintiffs do not contest the well-established principle that relief awarded in an antitrust case must not "impose penalties in the guise of preventing future violations." *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 409 (1945). Instead, they seek to defend the punitive nature of the breakup by arguing that the district court properly viewed Microsoft as "untrustworthy" and that Microsoft submitted a "plainly inadequate" proposal for relief. Pls. Br. at 126-27.

Taking plaintiffs' second point first, the district court was not entitled to order a breakup simply because the relief proposed by Microsoft was not to its liking. As Judge Wyzanski stated in *United Shoe*, courts would not have been given the authority to order divestiture in antitrust cases if they "were in the habit of proceeding with the surgical ruthlessness that might commend itself to those . . . aiming at immediate realization of the social, political, and economic advantages of dispersal of power." 110 F. Supp. at 348.

As to plaintiffs' first point, the district judge wreaked vengeance on the wrong party. It was the DOJ that misled the district court in 1997 by requesting entry of an order that prohibited "Microsoft from forcing OEMs to accept and preinstall the software code Microsoft separately distributes at retail as 'Internet Explorer 3.0.'" DX 1869 at 16; *see also* 147 F.3d at 940 (noting that district court's order employed DOJ's "exact words"). Although the DOJ assured the district court that "Microsoft should have no difficulty complying with that order," DX 1869 at 16, its own technical expert, Glenn Weadock, had already explained in detail to the DOJ why that assurance was false.

In his November 17, 1997 memorandum entitled "Defining IE. 3.0 and What Happens When It Is Removed," Weadock told the DOJ that "one of the options DOJ is considering in its request for relief" was problematic because "it removes shared DLL files necessary for the functioning of programs other than IE 3.0." DX 1715 at 22871. Contrary to plaintiffs' assertion, *see* Pls. Br. at 126, Weadock referred to COMCTL32.DLL as but one example of an operating system file that is updated by IE 3. Weadock told the DOJ directly that "[i]f you utterly remove [COMCTL32.DLL], which IE includes in the form of an updated version, Windows 95 won't work right." DX 1715 at 22871. Weadock continued, "Microsoft is technically correct in stating that deleting all the files with the same names as those included with IE 3.0 from a user's hard drive *will cripple the Windows 95 operating system*." DX 1715 at 22872 (emphasis added).

Although the DOJ had Weadock's memorandum three days before it filed its reply brief, 11/17/98 am Tr. at 5-6, the DOJ did not disclose the existence of the memorandum to Microsoft or the district court. Microsoft first saw a copy of the memorandum when the DOJ produced it in discovery in this case. Given this history, plaintiffs are poorly situated to argue that the district court was entitled to rely on Microsoft's "defiant response" to the December 1997 preliminary injunction—which was *reversed* by this Court, 147 F.3d 935—in ordering the breakup.

C. The Other Relief Awarded by the District Court Is Punitive and Unjustified.

Plaintiffs argue that the Court should ignore any objections to provisions of the decree that Microsoft incorporated by reference from its submissions below because it did not have space to discuss them in its opening brief. *See* Pls. Br. at 129. Yet plaintiffs themselves rely on those same submissions as purported evidence that Microsoft had its day in court on the issue of remedies. *See id*. at 127 & n.86. They cannot have it both ways.

In *International Boxing Club of New York, Inc.* v. *United States*, 358 U.S. 242, 253 (1959), the Supreme Court noted that "[t]he relief granted by a trial court in an antitrust case . . . has always had the most careful scrutiny of this Court." Similarly, in *Hartford-Empire,* the Supreme Court stated that "it is unthinkable that Congress has entrusted the enforcement of a statute of such far-reaching importance to the judgment of a single judge, without review of the relief granted or denied by him." 323 U.S. at 571. In the unlikely event the liability decision is affirmed in its entirety, this Court should examine the complete record below to determine whether the decree was properly entered. As Microsoft would have shown had it been given the opportunity, compliance with the decree's many extreme provisions would make it impossible for Microsoft to compete with industry giants such as AOL Time Warner, IBM and Sun, to the ultimate detriment of consumers. MS Offer of Proof at 22-23.

1. Confiscation of Microsoft's Valuable Intellectual Property

In arguing that the decree would not force Microsoft to disclose large amounts of valuable intellectual property to its competitors, *see* Pls. Br. at 129, plaintiffs' ignore both the plain language of the decree and their previous interpretations of that language. Moreover, in seeking to justify mandatory disclosure of proprietary information about the internal operation of *all* Microsoft operating systems—not just those addressed at trial—plaintiffs rely on the district court's distorted account of Microsoft's dealings with Netscape prior to the commercial release of Windows 95 and ignore controlling legal principles that entitle even a monopolist to withhold information about technological innovations from its competitors.

Plaintiffs assert that Section 3.b of the decree would require Microsoft to disclose to ISVs "only the Windows interface information that it gives to its own applications developers." *Id.* That seemingly innocuous assertion is contradicted by the plain language of Section 3.b when read in conjunction with the definitions of the terms used. *See* MS Br. at 135. In fact, when Microsoft sought to amend Section 3.b to clarify that it applied only to external interfaces utilized by applications running on Windows, *see* MS Comments on Pls. Revised Proposed Final J. at 19, plaintiffs rejected such an amendment and made clear that they were seeking mandatory disclosure of internal interfaces that components of Windows use to communicate with one another, *see* Pls. Summ. Resp. to MS Comments at 13-14. Any doubt on this score is eliminated by the right granted to Microsoft's competitors to examine "source code and any related documentation" (supposedly to enable their products to interoperate effectively with Windows). Such source code access would make it far easier for competitors to clone Microsoft's popular operating systems.

Plaintiffs do not even attempt to respond to the point that disclosing internal interfaces of Windows would harm Microsoft and various third parties. MS Offer of Proof at 13-16. Instead, they argue that Section 3.b is justified by a single episode in which Netscape supposedly did not obtain access to certain Windows functionality as quickly as it would have liked. Pls. Br. at 130. Putting aside the irony of this accusation, given plaintiffs' simultaneous insistence that it was a violation of Section 2 for Microsoft to encourage Netscape to use other Windows functionality, *see* MS Br. at 118-19, the district court was wrong that Netscape suffered substantial harm from the purported delay in its receipt of the information in question. Rick Schell, Netscape's vice president of engineering, testified that Netscape shipped a version of Navigator for Windows 95 "roughly concurrently" with Microsoft's release of the new operating system. DX 2587 at 45; *see also* DX 725 (e-mail from Maritz to Schell noting that Microsoft provided the requested APIs to Netscape "as fast as we could stabilize and document them"). Furthermore, Barksdale testified that Navigator for Windows 95 was the "killer application" for the new operating system. 10/27/98 pm Tr. at 71. In light of this evidence, there is no basis to conclude that Netscape suffered any harm at all, much less that *competition* was adversely affected.

Section 3.b also runs counter to settled legal principles. In *Berkey*, the Second Circuit noted that no court had ever required a company to disclose to its competitors information about products under development because such a requirement "would have an inevitable chilling effect on innovation." 603 F.2d at 282. Section 3.b would "diminish[] the innovator's gains" in precisely the way courts and commentators have warned against. IIIA AREEDA, *supra* ¶ 776c4, at 249. It is difficult to see why Microsoft would spend billions of dollars each year developing improved versions of Windows if it were forced to disclose the source code of those products to competitors.

2. Interference with the Design of Microsoft's Operating Systems

Plaintiffs' discussion of the provisions of the decree regulating the design of Microsoft's operating systems merely highlights the extreme complexity of the decree, and thus the almost infinite opportunity for disputes to arise as to its meaning. *See* Pls. Br. at 131-35. An injunction that is so vague that it "defies comprehension" is unenforceable. *Int'l Longshoremen's Ass'n* v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967).

Once again, plaintiffs offer a reading of the decree that ignores the definitions of the terms used. In discussing the effect of Section 3.g, plaintiffs refuse to acknowledge that Section 7.j defines "End-User Access" to include automatic invocation of a Middleware Product that is "compelled by the design of the Operating System Product." That counterintuitive definition gives rise to numerous problems when combined with the broad definition of Middleware Product in Section 7.r, which plaintiffs themselves read to encompass any software that provides functionality "for which there is separate consumer demand," Pls. Br. at 131. In other words, had Section 3.g been in effect in 1995, Microsoft could not even have designed Windows 95—an enormously popular product—to display its new graphical user interface automatically because there was then separate consumer demand for graphical user interface software. If Microsoft is placed in such a straightjacket in designing its operating systems, the ultimate victims will be consumers denied the benefits of progressively improved versions of Windows.

Although they have effectively conceded that Microsoft has a right under federal copyright law to prevent OEMs from making more than "minor modifications" to Windows, *see id.* at 72, plaintiffs make no effort to explain why that right is not violated by granting OEMs the right in Section 3.a.iii to replace the entire Windows user interface, the only aspect of Microsoft's creation visible to users. Describing such an alteration as "modest" (*id.* at 132) is Orwellian newspeak. Moreover, plaintiffs' assertion that allowing OEMs to make such alterations is necessary for middleware to secure distribution is plainly untrue, as the 40 to 70 million users of Navigator at the time of Barksdale's testimony make plain, *see* 10/21/98 pm Tr. at 13.

Plaintiffs' assurance that OEMs are not "likely" to modify Windows in ways that degrade the operating system is cold comfort. *See* Pls. Br. at 133. Plaintiffs ignore or fail to understand what Microsoft's Paul Maritz referred to as the "tragedy of the commons." Maritz ¶ 169. It is likely that individual OEMs, acting in what they perceive to be in their self interest, will modify Windows in an effort to differentiate their products from those of their competitors, and in so doing will destroy the very thing that makes Windows valuable to OEMs, ISVs and users—namely, the broad compatibility it provides across hardware and software products. *Id.* This is not merely a hypothetical possibility. The user interfaces that certain OEMs at one time installed on top of Windows 95 *did* degrade the functionality of the operating system. *See* Kempin ¶ 37.

Plaintiffs insist that Section 3.a.iii will not lead to fragmentation of the Windows platform—which they implicitly concede would be undesirable—because OEMs deciding to invoke non-Microsoft middleware by default (instead of taking advantage of similar functionality in Windows) would delete "little if any underlying Windows code and no APIs." Pls. Br. at 134. But one important benefit of Windows is the consistency of its user interface, allowing users to transfer their knowledge about how Windows works from one personal computer to another. *See* Maritz ¶¶ 174-75. Section 3.a.iii would quickly destroy that consistency, and plaintiffs do not contend otherwise. In addition, given the breadth of the definition of Middleware in Section 7.q, an OEM would be free to supplant large portions of Windows with Middleware from another vendor and then deny End-User Access to components of Windows that provide equivalent functionality. Plaintiffs assume that such modifications would do nothing to impair access to APIs exposed by Windows, *see* Pls. Br. at 134, but that is not clear given the definition of End-

User Access. For example, if OEMs were free to alter Windows to prevent "automatic invocation" of DirectX in favor of Apple's QuickTime, then applications that rely on DirectX (such as most games) would not function properly, or at all. *See* Maritz ¶¶ 170-72.

Plaintiffs' defense of Section 3.f, which prohibits Microsoft from adding a new feature to Windows unless OEMs are permitted to remove the software code that implements that feature, is based on the same semantic game as their tying claim. They contend that the provision is unobjectionable because it applies only to a "software product" that is distributed separately from Windows. *See* Pls. Br. at 134. Of course, that begs the question of what is meant by "software product." Because plaintiffs are more than happy to label upgraded components of Windows as separate "software products," Section 3.f would have all of the untoward effects Microsoft says it would. *See* MS Br. at 140-41.

V.

Microsoft Was Severely Prejudiced by the District Court's Handling of the Case.

In arguing that Microsoft suffered no prejudice by being forced to trial five months after the complaints were filed, Pls. Br. at 110, plaintiffs rely on a Section 1 case in which the plaintiffs complained that 15 months of discovery, including 270 depositions and the production of approximately two million documents, was not sufficient to prepare for trial. *See In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 818 (3d Cir. 1982). The analogy to this case is a poor one.

Plaintiffs' assertion that Microsoft agreed with the district court's highly-expedited schedule is baseless. At a status conference on August 6, 1998, Microsoft informed the district court that it would shortly be moving for summary judgment. In response, the district court cautioned Microsoft that "the filing of a dispositive motion will not toll your responsibility to get ready for trial on September 8th." 8/6/98 Tr. at 11. It is absurd to suggest that Microsoft, in saying it did not intend to seek a continuance on the basis of its summary judgment motion, *id.* at 12, thereby "agreed to a prompt trial date," Pls. Br. at 111; *see also* MS Br. at 143-44.

Plaintiffs pursue a similar line in arguing that Microsoft agreed to the district court's witness limitation. Pls. Br. at 114. When Pretrial Order No. 1 was entered on June 12, 1998, the trial that was to occur less than three months hence was to focus on the issues raised in plaintiffs' complaints and accompanying preliminary injunction motions. Those issues, relating exclusively to Microsoft's competition with Netscape in developing and marketing Web browsing software, could reasonably have been addressed with a modest number of witnesses. The situation changed, however, when the district court permitted plaintiffs to transform their case into a grab bag of disparate claims. At that point, adhering to the original witness limitation "jeopardize[d] the fairness of the trial." MANUAL FOR COMPLEX LITIGATION (THIRD) § 21.643, at 134 (1997).

Having objected to the district court's procedures when the expansion of the case became clear, *see* MS Br. at 143, it was not incumbent upon Microsoft to take exception to every action the district court thereafter took to implement those procedures. Thus, the fact that Microsoft submitted direct testimony that addressed a wide variety of topics that in a conventional trial would have been addressed by a number of witnesses more directly involved in the matters at issue (*see* Pls. Br. at 114) does not mean Microsoft agreed that witnesses should be allowed to testify about matters as to which they lacked personal knowledge. *See* FED. R. EVID. 602.

There can be no doubt that the district court permitted plaintiffs to expand their case dramatically once this Court's June 1998 opinion cast doubt on the central tenet of their case, namely, that the inclusion of IE in Windows was an unlawful tie-in. In paragraph 139 of the DOJ's complaint, on which plaintiffs rely, Pls. Br. at 112, the DOJ alleged that Microsoft had maintained a monopoly in PC operating systems "[t]hrough the anticompetitive conduct described herein." There is not one word in the preceding 138 paragraphs of the complaint about Microsoft's Java implementation for Windows, Intel's NSP software, Apple's QuickTime multimedia software, RealNetworks streaming media software or Microsoft's negotiations with IBM over a license for Windows 95. All of those claims were injected into the case at the last minute, as Microsoft was completing preparations for trial of the claims asserted in the complaints.

Plaintiffs invoke the concept of "notice pleading," Pls. Br. at 112, but they overlook what the cases they cite actually say. Although plaintiffs did not have to "allege all the facts necessary to prove [their] claim[s]," *Caribbean Broad. Sys., Ltd.* v. *Cable & Wireless PLC*, 148 F.3d 1080, 1086 (D.C. Cir. 1998), somewhere in the DOJ's 53-page complaint or in the States' 36-page complaint, plaintiffs were supposed to "provide[] enough factual information to make clear the substance of [their] claim[s]," *id.* They did not come close to doing that. As a result, Microsoft did not get "fair notice" of plaintiffs' claims and the grounds on which those claims rested. *See Atchinson* v. *District of Columbia*, 73 F.3d 418, 421 (D.C. Cir. 1996).

Plaintiffs contend that Microsoft suffered no prejudice from their assertion of new claims on the eve of trial because Microsoft managed to obtain some discovery regarding those claims. Pls. Br. at 112-14. Yet plaintiffs ignore that the new claims involved very complex subjects that are unrelated to the claims asserted in the complaints. For example, understanding why the real-time scheduler in the IA-SPOX component of Intel's NSP software is incompatible with the real-time scheduler in Windows 95 is a subject most lawyers find difficult to comprehend, and it is only one of many technical issues that must be mastered to understand why Microsoft opposed Intel's release of NSP software in the summer of 1995. *See* DX 1835.

A proper judicial determination of whether the wide range of conduct placed at issue by plaintiffs' new claims had any adverse impact on competition would have entailed a commitment of resources equal to or greater than that devoted to the claims actually alleged in the complaints. When the stakes are as high as they are in this case, a district court is not at liberty to experiment with novel summary procedures that deny the defendant the ability to gather and present necessary evidence.

Plaintiffs also do not deny that the district court admitted a plethora of hearsay. Nor do they deny that the absence of citations in the district court's findings of fact makes it impossible to determine what evidence the district court relied on in making those findings. Instead, plaintiffs argue that judges in bench trials sometimes admit hearsay that they are presumed to ignore in making their decisions. *See* Pls. Br. at 115. That presumption is rebutted, however, when it "appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made." *Multi-Med. Convalescent & Nursing Ctr. of Towson* v. *NLRB*, 550 F.2d 974, 977 (4th Cir. 1977). That is the situation here.

Although plaintiffs defend the district court's "liberal use of summary witnesses," Pls. Br. at 115, the authority on which they rely actually undermines their position. The acceptable use of such witnesses involves testimony that summarizes documents or testimony already in evidence or voluminous data compiled under the witness's direct supervision. *See* 27 CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE § 6026, at 229-30 (1990). The district court's use of summary witnesses was of a wholly different character.

For example, Steven McGeady, an Intel employee called by plaintiffs, testified that he was not authorized to speak on behalf of Intel, and he admitted that Intel's chairman, Andy Grove, and other senior Intel executives might disagree with aspects of his testimony. 11/12/98 pm Tr. at 75-76. McGeady further testified that he had no involvement in Intel's core microprocessor business. 11/9/98 pm Tr. at 5-6. The district court nonetheless permitted McGeady to testify that Microsoft might "fail to support" Intel's new MMX microprocessor if Intel did not stop developing platform-level software. 11/9/98 pm Tr. at 42-45. This testimony was the sole basis offered by plaintiffs for their proposed finding that Microsoft threatened not to support MMX. Pls. Joint Proposed Findings of Fact ¶ 351.2. As plaintiffs requested, the district court found that Microsoft threatened not "to support Intel's next generation of microprocessors" and that Intel discontinued its development of platform-level software as a result. 84 F. Supp. 2d at 35-36 (FF 102). In fact, Microsoft is a strong supporter of MMX, MS Revised Proposed Findings of Fact ¶¶ 1388-93, and McGeady himself testified that Intel did not scale back its development of platform-level software as a result of anything Microsoft did, 11/12/98 am Tr. at 38; *see also* DX 2599 at 61-62. In a proper trial, witnesses would not have been permitted to speculate regarding matters they knew nothing about, and the trial court would not have predicated findings on such speculation.

Plaintiffs' response to examples of the district court's reliance on inadmissible hearsay mentioned in Microsoft's opening brief merely highlights the problem. *See* Pls.' Br. at 116-18. The meager evidence plaintiffs have culled from the record to support the district court's finding that Microsoft threatened OEMs that distributed Navigator establishes little. The allegation that Microsoft penalized IBM for preinstalling Navigator on its personal computers is belied by plaintiffs' admission that IBM never stopped distributing Navigator. Pls.' Proposed Findings ¶ 205.3. Moreover, the Gateway e-mail that purports to relate what a Microsoft sales representative said in a telephone call is hearsay, and plaintiffs' reliance on the "present sense impression" exception to the hearsay rule is unavailing. Plaintiffs failed to establish that the e-mail was written immediately after the conversation. *See* 2 MCCORMICK ON EVIDENCE § 271, at 202-03 & n.25 (1999). Unless the time lapse between the conversation and the creation of the e-mail excluded any opportunity for reflective thought, the risk of error or fabrication forbids reliance on the e-mail. *See Hilyer* v. *Howaat Concrete Co.*, 578 F.2d 422, 426 n.7 (D.C. Cir. 1978). Plaintiffs also fail to mention that Gateway, like IBM, continued to distribute Navigator notwithstanding the statements related in the e-mail. *See* Kempin ¶ 21; DX 2597A at 131-34.

In addition, there is no authority for the proposition that a court may rely on what is said in newspaper articles just because an expert is willing to embrace such statements. *See* Pls. Br. at 117. When, during the course of the trial, the president of one of Microsoft's competitors tells the *Washington Post* that Linux poses no competitive threat to Windows, GX 1568, that assertion is no less hearsay because one of plaintiffs' economists says he agrees, 6/3/99 pm Tr. at 25. In fact, it was the use of experts as a conduit for such inadmissible hearsay that prompted the recent amendment to Rule 703 of the Federal Rules of Evidence.

Plaintiffs' discussion of the use of depositions at trial misses the point. Pls. Br. at 118. Plaintiffs do not deny that the district court changed the rules set forth in Pretrial Order No. 2 concerning use of depositions *after* Microsoft had noticed and taken its depositions. To be sure, Microsoft acted in accordance with the district court's new rule once the trial was underway, but Microsoft still suffered prejudice from the district court's reversal of position. In any event, the proposed finding of fact plaintiffs showcase as one that Microsoft supported with deposition testimony is an unfortunate choice for them. *See id*. The fact that Navigator suffered no distribution foreclosure was indeed confirmed by Netscape's two founders in their depositions. It also was supported, however, by a range of other evidence, *see* MS Revised Proposed Findings of Fact ¶¶ 461-523, and plaintiffs themselves conceded that Netscape distributed an "exceedingly high number of copies of Navigator," Pls. Joint Proposed Findings of Fact ¶ 366.1.iv.

VI.

The District Judge's Repeated Extrajudicial Statements and Discussions Provide an Independent Basis for Vacating the Judgment.

Plaintiffs do not deny that the district judge discussed the merits of the case with various reporters during trial, before issuing his findings of fact, before issuing his conclusions of law, before entering the decree and before ruling on post-trial motions. Such a denial would be pointless, as the following passage from Ken Auletta's book makes clear:

> "I didn't talk to anyone about the merits of the case," Jackson told me in defense of his press conversations. In fact, however, as he acknowledged after I raised an eyebrow, he *had* talked to me about the merits of the case, but only for publication after he issued his decisions.

AULETTA, *supra* at 382 (emphasis in original).

In ten hours of taped interviews, *id.* at 14 n.*, the district judge showed Auletta "a big green book where he kept notes on each witness" and "interpreted them for [Auletta] with [his] tape recorder going," CNN Morning News, Jan. 16, 2001. The district judge also discussed with Auletta the significance he attributed to the testimony of various witnesses, such as McGeady's testimony that "Gates complained that [Intel's] software competed with Microsoft." AULETTA, *supra* at 112. Microsoft had no idea such discussions were taking place because the district judge conducted them on the express "condition that his comments not be used until the case left his courtroom." JOEL BRINKLEY & STEVE LOHR, U.S. V. MICROSOFT 6 (2000).

Plaintiffs make no attempt to defend such conduct, nor do they deny the obvious import of the district judge's extensive interactions with reporters during the trial: the district judge not only was "talking for history" about his role in the case; he also was receiving extrajudicial information from reporters. In mid-April 2000, before plaintiffs submitted their proposal for relief, Auletta told the district judge that Microsoft employees had "professed shock that [the district judge] thought they had violated the law and behaved unethically," which caused the district judge to become agitated at Microsoft's "obstinacy." AULETTA, *supra* at 369. Microsoft has no way of knowing what other information reporters provided to the district judge in his secret discussions with them or what effect those two-way communications had on his handling of the case or the decisions he rendered. *See United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1464 (D.C. Cir. 1995) (per curiam) (relying on receipt of *ex parte* communications as one basis for remanding case to different district judge).

Plaintiffs have no answer to the point that the district court's derogatory comments about Microsoft have cast him in the public eye as an adversary of the company. *See* MS Br. at 146-50. They completely ignore the Tenth Circuit's decision in *United States* v. *Cooley*, 1 F.3d 985 (10th Cir. 1993), which demonstrates that the district judge's conduct here violated 28 U.S.C. § 455(a) and is grounds for reversal. The district judge's public comments on the merits of the case not only threaten to call the integrity of the judicial process into question; they have already done so. *E.g.*, Editorial, *Judge Jackson's Remarks*, WASH. POST, Jan. 16, 2001, at A20; Editorial, *So Much for the Rule of Law*, N.Y. POST, Jan. 10, 2001, at 32.

Plaintiffs' contention that the district judge's comments come within the "legal education" exception to Canon 3A(6) is frivolous. Pls. Br. at 148-49. Chatting with reporters in chambers or giving luncheon speeches to groups of lawyers does not constitute "a scholarly presentation made for purposes of legal education." *Report of the Judicial Conference Committee on Codes of Conduct* at 7 (Sept. 1992).

Although plaintiffs are correct that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion," Pls. Br. at 145 (quoting *Liteky* v. *United States*, 510 U.S. 540, 555 (1994)), Microsoft is complaining about more than that. In addition to commenting publicly about the case and engaging in undisclosed *ex parte* communications about its merits, the district judge awarded sweeping relief without conducting an evidentiary hearing based on his publicly-stated view that Microsoft was not entitled to due process. Brinkley & Lohr, NEW YORK TIMES, *supra* at C8. The district court also ordered that Microsoft be broken up, without any consideration of the serious harm that would ensue, as punishment for Microsoft's purported "intransigence." James V. Grimaldi, *Microsoft Judge Says Ruling at Risk*, WASH. POST, Sept. 29, 2000, at E1. As this Court previously held with regard to far less egregious conduct, "the district judge's failure to accord any weight to Microsoft's interests in making its determination adds to the appearance of bias in this case." *Microsoft*, 56 F.3d at 1464.

Plaintiffs' assertions that the district judge's comments do not reflect "deep-seated . . . antagonism" toward Microsoft (Pls. Br. at 146) and that there is "no reason to doubt Judge Jackson's impartiality" (*id.* at 149) are astonishing. In *Liteky*, the Supreme Court cited the district court's comment in *Berger* v. *United States*, 255 U.S. 22 (1921), as a prototypical example of judicial bias. 510 U.S. at 555. That comment—"[o]ne must have a very judicial mind, indeed, not [to be] prejudiced against the German-Americans" because their "hearts are reeking with disloyalty," 255 U.S. at 28—is akin to the district judge's *ad hominem* remarks about Microsoft. The district judge "went as far as to compare the company's declaration of innocence to the protestations of gangland killers." Auletta, NEW YORKER, *supra* at 40-41. The comment is worse in the details.

> [The district judge] was so agitated by what he called Microsoft's "obstinacy" that he carelessly compared their proclamations of innocence to those of four members of the Newton Street Crew convicted in a racketeering, drug dealing, and murder trial he had presided over five years before. There were brutal murders in that case, he recalled: three of the victims had their mouths sealed with duct tape before they were shot in the head with machine guns . . . . "On the day of the sentencing," Jackson remembered, "they maintained that they had done nothing wrong, that the whole case was a conspiracy by the white power structure to destroy them. I am now under no illusions that miscreants will realize that other parts of society view them that way."

AULETTA, *supra* at 369-70.

This Court previously held that a district judge's in-court comments that evidenced "his generally poor view of Microsoft's practices" were a factor to be considered in deciding whether an objective observer would question the district judge's impartiality. *Microsoft*, 56 F.3d at 1464-65. The district judge's extrajudicial comments here created a similar appearance of partiality, if not demonstrating actual prejudice or bias.

"A District Judge, particularly one adjudicating a case of considerable public moment, must scrupulously avoid giving the parties or the public any basis for perceiving that he is deciding the case otherwise than pursuant to an application of controlling law to the facts and in the exercise of his impartial, independent, considered judgment." *S. Pac. Communications*, 740 F.2d at 984. By airing freely with journalists his personal views about Microsoft and its executives as well as the merits of the case while the case was still pending, the district judge not only violated the Code of Conduct for United States Judges, but also raised profound doubts about his impartiality and the fairness of the trial he conducted.

CONCLUSION

The Court should reverse the judgment below and direct the entry of judgment for Microsoft. As to any aspect of the judgment not reversed, the Court should vacate and remand the case to a different district judge for a new trial.

Respectfully submitted,

____

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January 29, 2001

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